No. 89-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,

Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

LEE H. SIMOWITZ*
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PETITION FOR CERTIORARI FILED OCTOBER 30, 1989
CERTIORARI GRANTED JANUARY 8, 1990

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 18, 1980	-	Order and Notice of Apparent Liability adopted; designated BC 80-730 for hearing.
Dec. 4, 1980	-	Statement of Distress Sale Election and Motion to Hold Procedure in Abeyance filed by Faith Center, Inc. ("Faith Center"), at the Federal Communications Commission ("FCC").
Feb. 20, 1981	-	First Petition for Special Relief filed by Faith Center at the FCC.
Dec. 22, 1981	-	Faith Center's February 20, 1981 Petition for Special Relief is granted; and the proceeding is terminated by the FCC.
Sept. 29, 1982	-	Second Petition for Special Relief is filed by Faith Center at the FCC.
Dec. 27, 1982	-	Petition for Leave to Intervene and to Deny filed by Alan Shurberg at the FCC.
Sept. 27, 1983	-	Faith Center's September 29, 1982 Petition for Special Relief is granted and the proceeding is terminated by the FCC.
May 14, 1984	-	Petition for Leave to Intervene filed by Alan Shurberg and Shurberg Broadcasting of Hartford, Inc. ("Shurberg") at the FCC.
June 25, 1984	-	Third Petition for Special Relief filed by Faith Center at the FCC.

June 28, 1984 - Transfer Assignment Application filed by Faith Center at the FCC.

Nov. 9, 1984 - Faith Center's June 28, 1984 Petition for Special Relief is granted; Faith Center and Astroline's June 28, 1984 Petition for Expedited Processing is granted by the FCC.

Dec. 10, 1984 - Notice of appeal of an order of the FCC filed by Shurberg at the U.S. Court of Appeals for the D.C. Circuit ("Court").

Dec. 10, 1984 - Emergency motion for stay filed by Shurberg at the Court.

Dec. 11, 1984 - Memo from Associate General Counsel advising that on December 10, 1984, Shurberg filed with the Court a Notice of Appeal of the FCC's *Memorandum Opinion and Order*, (FCC 84-613), released December 7, 1984, in which the FCC granted the Petition for Special Relief of Faith Center.

Dec. 13, 1984 - Notice of intention to intervene filed by Astroline at the Court.

Dec. 21, 1984 - Per Curiam Order that the emergency motion for stay is denied.

Feb. 21, 1985 - Brief filed by Shurberg at the Court.

May 31, 1985 - Brief filed by Astroline at the Court.

July 1, 1985 - Reply brief filed by Shurberg at the Court.

July 12, 1985 - Final brief filed by Shurberg at the Court.

July 15, 1985 - Brief filed by Astroline at the Court.

July 29, 1985 - Brief filed by FCC at the Court.

Dec. 27, 1985 - Supplemental brief filed by Shurberg at the Court.

Jan. 8, 1986 - Reply to supplemental brief filed by Astroline at the Court.

Jan. 8, 1986 - Argued before Wald, Silberman, CJs & MacKinnon, SCJ BIN.

Sept. 18, 1986 - Court Clerk's order, on its own motion, that the FCC file a supplemental brief no later than 14 days from the date of this order addressed to the following question: In view of its position on the constitutionality of female and minority preferences is comparative hearings, as set out in *Steele v. FCC*, filed September 15, 1986, what is the agency's current position as to the constitutionality of its minority distress policy?

Oct. 23, 1986 - Motion for remand filed by FCC at the Court.

Jan. 2, 1987 - Letter from counsel for FCC advising of recent proceedings at the FCC and furnishing copies of the *Notice of Inquiry*.

Jan. 23, 1987 - Court Clerk's order that the record is remanded for ninety (90) days, without extension, to permit the FCC to resolve its position with respect to the license at issue in this case. CJ Wald, Silberman, CJ and MacKinnon, SCJ.

April 7, 1987 - Per Curiam Order denying FCC's motion for further remand or, in the alternative, to hold in abeyance and advising that the Court's Order of January 23, 1987 remains in effect. CJ Wald, Silberman, CJ and MacKinnon, SCJ.

June 25, 1987 - Per Curiam Order that the record in this case is remanded for further proceedings.

April 6, 1988 - Per Curiam Order that the Clerk is directed to file the motion of Shurberg and, that the motion of Shurberg is partially granted and the Court will proceed to render its decision on the merits of this case in the normal course of the business of the Court. CJ Wald, and Silberman, CJ; MacKinnon, SCJ.

Oct. 3, 1988 - Per Curiam Order granting Shurberg's motion for leave to make informational submission and directing the Clerk to lodge the amicus curiae brief of the U.S. filed in No. 85-1755 & 85-1756, *Winter Park Communications, Inc. v. Federal Communications Commission*, and further ordering, *sua sponte*, that the FCC lodge with this Court its brief filed in 85-1755 & 85-1756, *Winter Park Communications, Inc. v. Federal Communications Commission.*

March 31, 1989 - Opinion Per Curiam.

March 31, 1989 - Separate Opinion filed by Circuit Judge Silberman.

March 31, 1989 - Separate Opinion filed by Senior Circuit Judge MacKinnon.

March 31, 1989 - Dissenting Opinion filed by Chief Judge Wald.

March 31, 1989 - Judgment by the Court that the case is remanded to the FCC for further proceedings, in accordance with the Opinion for the Court.

March 31, 1989 - Mandate order by the Court.

May 15, 1989 - Petition for rehearing and suggestion for rehearing *en banc* filed by FCC.

May 15, 1989 - Petition for rehearing with suggestion for rehearing *en banc* filed by Astroline.

June 16, 1989 - Opinion Per Curiam. Statement of Chief Senior Circuit Judge MacKinnon attached.

June 16, 1989 - Opinion Per Curiam. Statement of Chief Judge Wald, joined by Circuit Judge Robinson, Mikva, Edwards and Ruth B. Ginsburg attached.

June 16, 1989 - Per Curiam Order denying the petitions for rehearing. Chief Judge Wald would grant the petitions for rehearing. Statement of Senior Circuit Judge MacKinnon is attached. CJ Wald, Silberman, CJ and MacKinnon, SCJ.

June 16, 1989 - Order by the Court, *en banc*, that the suggestions for rehearing *en banc* are denied.

July 12, 1989 - Mandate issued by the Court.

Sept. 1, 1989 - Motion for Enforcement of Mandate filed by Shurberg at the Court.

Sept. 11, 1989 - Opposition to Shurburg's Motion for Enforcement of Mandate filed by Astroline at the Court.

Sept. 11, 1979 - Opposition to Motion for Enforcement of Mandate filed by FCC at the Court.

Sept. 12, 1989 - Notice from Clerk's Office, U.S. Supreme Court that the Chief Justice signed an order extending the time within which to file a petition for a writ of certiorari to and including 10/29/89.

Sept. 29, 1989 - Per Curiam Order that Shurberg's Motion For Enforcement of Mandate is denied by the Court.

Nov. 9, 1989 - Notice from the Supreme Court of filing petition for certiorari.

Jan. 9, 1990 - Letter from Supreme Court Clerk's Office enclosing order dated 1/8/90 granting petition for writ of certiorari.

"Petition for Special Relief" filed with the Federal Communications Commission ("FCC") by Faith Center, Inc. ("Faith Center"), June 25, 1984

DESCRIPTION OF THE PURCHASER

1. Astroline Communications Company is a Massachusetts limited partnership comprised of two General Partners and one Limited Partner.

A. Richard P. Ramirez, a Hispanic-American and experienced broadcaster, is a General Partner of Astroline Communications Company. He holds a twenty-one percent (21%) partnership interest in the limited partnership and will be the General Manager of the television station.

B. WHCT Management, Inc. ("WHCT Management") is a corporation duly organized under the laws of the State of Massachusetts and is also a General Partner in Astroline Communications Company. Presently, WHCT Management holds a nine percent (9%) partnership interest in the limited partnership. If, however, the Commission approves the proposed distress sale, WHCT Management will transfer four percent (4%), or four-ninths (4/9), of its nine percent (9%) interest in the partnership to additional minority personnel, preferably Blacks who will be involved in the day-to-day operation of the television station. Thus, pursuant to that transfer, the total minority equity interest in the partnership will be twenty-five percent (25%), with minorities controlling the station's daily operation.

C. The remaining partner in Astroline Communications Company is Astroline Company, a Massachusetts limited partnership. Astroline Company holds a seventy percent (70%) limited partnership interest in Astroline Communications Company and will not control the day-to-day operation of the station.

2. The chart set forth below describes each partner's financial interest and managerial control of Astroline Communications Company:

Richard P. Ramirez (21%)	General Partner	General Manager Full Operational Control
WHCT Management, Inc. (9%)*	General Partner	Limited Operational Control
Astroline Company (70%)	Limited Partner	No Operational Control

* WHCT Management, Inc. will transfer four percent (4%) of its nine percent (9%) interest to minority personnel, if the Commission approves the distress sale of WHCT to Astroline Communications Company.

3. Astroline Communications Company is a qualified minority purchaser as defined by the Commission's *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 42 RR 2d 1689 (1978), as revised, 52 RR 2d 1301 (1982).

> [W]here the general partner is a minority individual and owns more than a 20 percent interest in the broadcasting entity, there exists sufficient minority involvement to justify favorable application of the Commission's . . . distress sale policies.

Id. at 1305-06.

In accordance with the Commission's *Policy Statement*, the twenty-one percent (21%) interest in Astroline Communications Company held by Mr. Ramirez and his status as the General Manager surpasses the Commission's minimum standards. Additionally, minority ownership and control of Astroline Communications Company will increase when WHCT Management transfers four percent (4%) of its nine percent (9%) interest to additional minority personnel that will be interviewed and hired within 90 days following the consummation of the proposed distress sale.

Thus, Astroline Communications Company is a qualified minority purchaser as defined by the Commission because the total minority interest and control in Astroline Communications Company will be twenty-five percent (25%).

"Comments in Opposition to Petition for Extraordinary Relief" filed with the FCC by Astroline Communications Company Limited Partnership ("Astroline"), July 23, 1984

The Transfer of the Station to ACC Pursuant to the Distress Sale is Appropriate in the Instant Proceeding

The Commission specifically developed its distress sale policy to resolve cases such as the instant one. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 42 RR 2d 1689 (1978), *as revised*, 52 RR 2d 1301 (1982). The Commission's *1978 Policy Statement* provided distress sale relief to a broadcast licensee whose renewal application had been designated for hearing. Under the *1978 Policy Statement*, the Commission permits a broadcaster, whose license has been designated for revocation hearing, to dispose of his station through a distress sale if the purchaser is a qualified minority and the sale price is not more than seventy-five percent (75%) of the fair market value of the station.

The distress sale policy was formulated by the Commission to increase minority ownership of broadcast facilities. In an effort to encourage broadcasters to take advantage of this new policy, the Commission assured broadcasters that "applications by parties seeking relief under our . . . distress sale policies can be expected to receive expeditious processing."

In 1982, the Commission revised its earlier *Policy Statement* and released a new *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 52 RR 2d 1301 (1982). Among the revisions was a relaxation of the Commission's threshold requirements for approving distress sale petitions. In an effort to further increase the use of distress sales, the Commission broadened the distress sale policy to include limited partnerships that had control vested in a General Partner that was a minority citizen with at least a twenty percent (20%) equity interest in the station and operational control over the station's affairs. *Id.* at 1306.

In accordance with the Commission's *1982 Policy Statement*, ACC is a qualified minority purchaser. *See* Attachment 1. The General Partner is a member of a minority group and owns more than a twenty percent (20%) equity interest in the broadcast entity. Richard P. Ramirez, a Hispanic-American and the controlling General Partner of ACC, holds a twenty-one percent (21%) ownership interest in the limited partnership and will run the day-to-day operation of the station. The other General Partner, WHCT Management, holds a nine percent (9%) partnership interest in the limited partnership. An additional four percent (4%) of WHCT Management's nine percent (9%) has been reserved for minority persons, preferably Black-Americans, that will be involved in the day-to-day management of the station. The remaining seventy percent (70%) interest in ACC is held by Astroline Company, a Limited Partner who will not be involved in the day-to-day operation of the television station.

Additionally, ACC proposes to purchase the station for $3.1 million, a price which is far below seventy-five percent (75%) of the station's fair market value. Thus, the purchase price of the station is consistent with the Commission's distress sale policy.

In light of the financial problems encountered by the two earlier proposed assignees of WHCT-TV, ACC clearly demonstrated its financial qualifications. In a letter to Faith, the First National Bank of Boston documented ACC's ability to consummate the proposed transaction. *See* Attachment 2. Specifically, the letter stated that ACC has sufficient assets to cover both a cash payment to Faith of $500,000 on the closing date and make payments on a ten-year note for $2.6 million at a fixed interest rate of twelve percent (12%) per annum. The Bank later expanded its financial commitment to ACC in a letter that authorized the creation of a $10 million line of credit for renovating and operating the proposed television station. *See* Attachment 3.

THE FIRST NATIONAL BANK OF BOSTON

DAVID K. MCKOWN
First Vice President

May 15, 1984

Edward L. Masry, Jr., Esquire
Counsel for Faith Center
15495 Ventura Boulevard
Sherman Oaks, CA 91403

Re: *WHCT-TV, Channel 18, Hartford, Connecticut*

Dear Mr. Masry:

We understand that you have requested verification of the financial qualifications of Astroline Company prior to entering into negotiations with them regarding the acquisition of the license and facilities of WHCT-TV, Channel 18 in Hartford, Connecticut.

The First National Bank of Boston has considerable experience working with Fred Boling and the other partners of Astroline. They have an excellent credit rating and relationship with our Bank. They also have honored all commitments that have been made to us in the past.

Upon review of Astroline's accounts with us, they have sufficient net liquid assets on deposit or readily available from other sources to cover the proposed transaction which involves a $500,000 cash payment at closing to your client.

Assuming the discussions between your client and Astroline develop further, we are willing and prepared to work with you in the future to provide the additional information necessary to verify Astroline's financial qualifications. If you would like to discuss this matter in greater detail, please feel free to contact me.

Sincerely,

/s/ David K. McKown

"FCC Opposition to Emergency Motion for Stay" filed with the Court of Appeals by the FCC, December 14, 1984

WHY THE STAY SHOULD NOT BE GRANTED

A. The Balance of Equities Weighs Heavily Against Shurberg's Request for Stay.

Under *Holiday Tours* the decision whether to grant a stay or other temporary equitable relief will be based largely on the "balance of equities"—taking into account whether the movant has shown that without a stay it will be irreparably injured, whether a stay will harm other parties and whether the public interest favors or counsels against grant of a stay. 182 U.S. App.D.C. at 222, 559 F.2d at 844. In this case the balance of equities tips decidedly *against* staying the effectiveness of either the Commission order allowing the distress sale or its staff's order granting the actual assignment of license.[5]

1. Irreparable Injury

Shurberg has failed completely to demonstrate that it will suffer injury if the Commission action here is not stayed. And even if Shurberg's arguments could be deemed to show injury, that injury is not in any sense irreparable. Irreparable harm is the "sine qua non for the grant of such equitable relief." *Buffalo Forge Co. v. Ampco-Pittsburgh Corp.*, 638 F.2d 568, 569 (2d Cir. 1981). Shurberg's brief discussion of irreparable injury, buried deep in its 49-page motion, suggests only one basis for its claim of injury. Motion at 36-38. That appears to be that if the assisgnment is consummated,

> Astroline will take Faith Center's place as licensee of the station, and Faith Center will simply

[5] As will be apparent, the same reasoning would also call for denial of a request for stay of any subsequent Commission order affirming its staff's action granting the assignment application.

> go away insofar as the Hartford station is concerned. If SBH's appeal of the Commission's decision is successful and SBH is found by this Court to be entitled to comparative status as against Faith Center, the Commission will as a practical matter be unable to restore that right—obviously, if Faith Center is gone the Commission is going to be neither willing nor able to bring Faith Center back within its jurisdiction for the sole purpose of prosecuting a comparative proceeding for a broadcast license which Faith Center no longer holds. But that is the only way in which SBH could be accorded its rightful status, *i.e.*, comparative status with Faith Center.

Motion at 36. Shurberg's argument reflects a total misunderstanding of what would happen in the unlikely event that it should prevail on appeal.

In the first place, Shurberg ignores the well established proposition that assignments consummated pending judicial review are contingent on the outcome of the review proceeding. The FCC has made clear in the past that parties who act in reliance on agency decisions before they have become final and beyond reconsideration by the Commission or review by the courts, do so at the risk that they may have to reverse that action. *See Teleprompter Corp.*, 50 Radio Reg. 2d (P&F) 125, 127 (CATV Bur. 1981); *Improvement Leasing Co.*, 73 F.C.C.2d 676, 684 (1979), *aff'd, Washington Ass'n for Television and Children v. FCC*, 214 U.S.App.D.C. 446, 665 F.2d 1264 (1981). If the Commission's orders were to be reversed on appeal, whatever action was taken in reliance on the orders could and would be undone. *See Virginia Petroleum Jobbers*, 104 U.S.App.D.C. at 112, 259 F.2d at 927. *See also* 47 U.S.C. 402(h).

If Shurberg should prevail on review, Astroline will be required to return the license to Faith Center. If the Commission should be unable, as Shurberg asserts, "to bring Faith Center back within its jursidiction" at that time, the obvious result will be that Faith Center will not be a competitor for renewal of the license. If Shurberg prevails on its theory that its December 1983 application is the only one entitled to comparative consideration and Faith Center is unwilling to appear and compete in a comparative renewal proceeding, it seems clear to us that Shurberg would, if it is qualified to be a broadcast licensee, obtain the license by default. If Shurberg is wrong in its speculation about what Faith Center would do in these circumstances, and if Faith Center did take the license back and actively participate in the comparative hearing, then Shurberg would have the comparison to which it asserts that it is entitled.

There is no basis to believe that if Shurberg should succeed on the merits of its appeal the Commission would be unable to provide it with complete relief—including vacating the grant of an assignment application if it had been done on the basis of order set aside on review. In either of the hypothetical cases noted above, we fail to see why these results would not provide a complete remedy that would totally vindicate Shurberg's interests and preclude any allegation of irreparable injury.[6]

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[6] Shurberg's argument (Motion at 37) that the Commission has sought "to 'co-opt' SBH's position before this Court by holding open the possibility of comparative consideration at some future date" is really beside the point. The nature of Shurberg's comparative rights, if any, will be decided on review when there is an appealable order. Whether Shurberg is found to be the only party who is entitled to compete for the application or whether the Commission can accept other competing applications, is immaterial to the clear fact that whatever comparative rights Shurberg is ultimately found by this Court to have, if any, they can be completely vindicated upon remand to the Commission following review. Pending judicial review, Shurberg has not shown any reason to foreclose Astroline from taking control of and operating the station.

"Memorandum of Intervenor [Astroline] in Opposition to Appellant's Emergency Motion for Stay", filed with the Court of Appeals by Astroline, December 14, 1984

B. There is No Irreparable Harm to Shurberg if the Stay is Denied

Shurberg must also establish that it will be irreparably harmed if a stay is not issued. Shurberg's entire irreparable injury argument, however, is based on the notion that it is currently entitled to protected status in an exclusive comparative hearing with Faith Center, *i.e.* it would be the only applicant entitled to participate in the hearing. At this point, however, Shurberg's asserted "right" is highly conjectural, if it exists at all. The Commission has already indicated that, if the distress sale to Astroline falls through, it will open the proceedings up to a full comparative hearing.

More important, were this Court to conclude that preservation of comparative considerations is of paramount importance in relation to the countervailing public interest factors relied on by the Commission in its MO&O, those considerations would compel the court to remand this case to the Commission to conduct an open comparative hearing. *New South* at 718. In this light, there clearly is no potential irreparable injury to Shurberg.

Shurberg's failure to properly challenge Astroline's qualifications in the proceeding below compels a conclusion that irreparable harm does not exist. The Commission's decision granting Faith Center's petition for special relief covers only one aspect of the distress sale. As noted above, Astroline filed its Transfer Assignment Applications with the Commission on June 28, 1984 which set forth Astroline's qualifications to become a licensee. Shurberg did not, however, oppose the application, despite its knowledge and its ability to do so. To the extent that Shurberg has lost any rights to challenge Astroline's qualifications to become a licensee in the distress sale that it may have had, it was

due to its own omission. Accordingly, Shurberg can not assent that it would be irreparably harmed by denial of its motion for a stay.

To the extent Shurberg is injured by the Commission action, it is because it will not receive the FCC license. But there is no judicial or administrative decision which holds that denial of the license constitutes irreparable injury justifying issuance of a stay. There is, of course, substantial authority to the contrary, including decisions of the Commission. In *Grand Broadcasting Company*, 4 Rad.Reg.2d (P&F) 205 (F.C.C. 1964), an unsuccessful applicant for a new television station license petitioned for a stay pending judicial review of the Commission's decision granting the license to a competing applicant. The Commission denied the stay, noting that "[t]he administrative proceedings have been concluded and the possible commencement or the pendancy of a judicial review proceeding has not been considered a sufficient reason for staying the Commission's decision in these circumstances." *Id.* at 206. *Accord WHDH, Inc. (WHDH-TV)*, 23 Rad.Reg.2d (P&F) 914 (F.C.C. 1972) (fact that application for television license renewal was denied was not sufficient to show irreparable injury). Similarly, the grant of a NASA procurement contract to the lowest bidder has been held not to constitute irreparable injury to the losing bidders. *Floyd F. Miner Security Service, Inc. v. Paine*, 27 Ad.L.Rep.2d (P&F) 456 (D.D.C. 1970).

The facts in this case preclude a finding that Shurberg would be irreparably harmed if the stay is lifted. If Shurberg ultimately prevails on the merits on appeal, Astroline would be compelled to divest its interest in WHCT-TV. The station would then be made available to competing applicants and Shurberg would be free to compete. Astroline, not Shurberg, incurs the entire risk of proceeding with the purchase and operation of station WHCT-TV.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 84-1600

Shurberg Broadcasting of Hartford, Inc.,
Appellant,

v.

Federal Communications Commission,
Appellee

Astroline Communications Company Limited Partnership,
Intervenor

United States Court of Appeals
For the District of Columbia Circuit
FILED DEC 21 1984

GEORGE A. FISHER
CLERK

Before: Wright, Bork and Mikva,* Circuit Judges

ORDER

Upon consideration of Shurberg Broadcasting of Hartford, Inc.'s ("appellant" or "Shurberg") Emergency Motion for Stay and the oppositions and reply thereto, and the Federal Communication Commission's ("Commission") Motion to Dismiss and the opposition thereto, it is

ORDERED by the court that the Emergency Motion for Stay is denied.

In order to obtain a stay a party must 1) make a strong showing that it is likely to prevail on the merits of its appeal, 2) demonstrate that it will be irreparably injured if a stay is denied, 3) show that other parties will not be

substantially harmed by the issuance of the stay, and 4) demonstrate that a stay is in the public interest. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), *citing Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). Although appellant "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation," *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953), appellant has failed to demonstrate that it would be irreparably injured in the absence of a stay, or that other parties and the public interest would not be harmed by the issuance of a stay.

Two scenarios are possible under the Commission's December 7, 1984 order. Either the distress sale between Faith Center, Inc. ("Faith Center") and Astroline Communications Company ("Astroline") will be consummated or a comparative hearing will be held between Faith Center, Shurberg, and any other applicants who file during the new ninety day "window". In either event, if Shurberg is ultimately successful on its appeal, the Commission could provide complete relief to Shurberg because the successful licensee would take the license subject to judicial review. *See Telepromter Corp.*, 50 Rad. Reg. 2d (P&F) 125, 127 (CATC Bur. 1981); 47 U.S.C. § 402(h) (1982). *See also Grand Broadcasting Company*, 4 Rad. Reg. 2d (P&F) 205, 206 (F.C.C. 1964) (at conclusion of administrative proceedings unsuccessful applicant for new television station license denied stay because "possible commencement or the pendency of a judicial review proceeding has not been considered a sufficient reason for staying the Commission's decision in these circumstances"). Appellant's claim that it might be unable to meet the costs of pursuing the litigation simply does not amount to irreparable injury. *See Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974) ("mere litigation expense, even substan-

tial unrecoupable costs, does not constitute irreparable injury"). Further, both Astroline's interest in consummating the transaction and the public's interest in ridding the Hartford area of a broadcaster of Faith Center's questionable reputation would likely be harmed by the issuance of the stay. Thus, although appellant may ultimately prevail on the merits of its appeal—a question which the court need not and does not reach at this stage—it has failed to satisfy the requirements for the issuance of a stay. It is

FURTHER ORDERED by the court that the Interim Stay issued on December 11, 1984 is vacated. It is

FURTHER ORDERED by the court that the Commission's Motion to Dismiss, filed December 14, 1984, is held in abeyance pending the response from appellant.

The Clerk is directed to transmit a certified copy of this order to the Federal Communications Commission.

Per Curiam

* Circuit Judge Mikva did not participate in this order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 84-1600

Shurberg Broadcasting of Hartford, Inc.
v.
Federal Communications Commission

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 18 1986

GEORGE A. FISHER
CLERK

ORDER

It is ORDERED, by the Court, on its own motion, that the Federal Communications Commission file a supplemental brief no later than 14 days from the date of this order addressed to the following question:

> In view of its position on the constitutionality of female and minority preferences in comparative hearings, as set out in its brief in *Steele* v. *FCC*, filed September 15, 1986, what is the agency's current position as to the constitutionality of its minority distress policy?

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Letter to Honorable Mark S. Fowler, Chairman, Federal Communications Commission from Richard A. Hauser, counsel for Astroline, October 16, 1986, and accompanying four-page summary of WHCT programming

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October 16, 1986

Honorable Mark S. Fowler
Chairman
Federal Communications Commission
8th Floor
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600

Dear Mr. Chairman:

On behalf of Astroline Communications Company, I am pleased to forward the attached information for the Commission's consideration in its review of the constitutionality of the distress sales policy at the Federal Communications Commission as it was applied in the above-captioned case.

As you may recall, Astroline Communications Company purchased WHCT-TV from Faith Center, Inc. for $3.1 million pursuant to the Commission's distress sales policy. Astroline took the station off the air and then later resumed full broadcast services on September 30, 1985, after expending approximately $7 million to acquire new programming and renovate the studio and other facilities. A year has passed since then, and Astroline has continued

to inject private capital into the Hartford market and to date its total expenditures approximate $17 million.

As a result of Astroline's acquisition of WHCT-TV, the citizens of Hartford have many program choices available to them that were not present during the term of the Faith Center license. Specifically, Astroline regularly broadcasts on WHCT-TV four (4) bilingual public affairs programs targeted towards the Hispanic community, three (3) weekly programs targeted towards the Black community, and other special programs for children. Very recently, Astroline was awarded the rights to broadcast games of the Hartford Whalers hockey team and the games of the University of Hartford basketball team. Attached is a summary of WHCT-TV's current program schedule. In total, these new programs have sparked growth, competition and diversity in the television marketplace in the Hartford-New Haven area.

We have taken the liberty of summarizing these points and the recent cases discussing the constitutionality of similar race-conscious programs in a statement in support of the distress sales policy and we have enclosed a copy for your review.

Very truly yours,

/s/ Richard A. Hauser
Richard A. Hauser

Attachments a/s

cc: Members of the Commission
Harry Cole, Esquire
Counsel to Shurberg Broadcasting of Hartford, Inc.

WHCT
18
HARTFORD NEW HAVEN

CHILDREN'S PROGRAMMING

"Romper Room"-Educational
"Polka Dot Door"-Educational
"Professor Kitzel"-Educational
"Dr. Doolittle"
"Hardy Boys"
"Top Cat"
"Fun World Of Hanna Barbera"
"Josie And The Pussycats"
"Lancelot Link"
"Rocky & Friends"
"Tennessee Tuxedo"

CHILDREN'S ANIMATED MOVIES

"Flame Over India"
"Hans Christian Anderson"
"Gregory's Girl"
"Aladdin And His Wonderful Lamp"
"The Golden Seal"
"Wonder Man"
"Treasure Train"
"Thief Of Bagdad"
"Slip Slide Adventures"
"Island Of Adventure"
"Crossbar"
"The Glacier Fox"
"The Adventures Of Curly And His Gang"
"Swan Lake"
"Tarka The Otter"
"Elephant Boy"

Since WHCT-TV18 signed on September 30, 1985, we have made a commitment to children's programming far different to commitments made by typical Independent television stations airing such programs as "G.I. Joe", "He-Man", "Transformers", "Gobots", "Voltron", etc. The management at WHCT-TV18 has taken a stand to air educational programs for children and more "wholesome cartoons". We have been in touch with Action for Children's Television (ACT) on many occasions for guidance in this effort. The only bona fide syndicated program that we have purchased has been "Brady Bunch", a perfect example of a typical American family and the problems and joys of raising six children.

We have made a commitment to air "Kidsworld", effective 10/6/86, which not only portrays children in a very positive light as scholars, but teaches them responsibility and discipline. WHCT-TV18's purchase of "The Children's Cinema Classics", which are scheduled during family viewing hours on Sunday, brings to parents the opportunity not only to let their children watch educational television, but also to watch television with their kids as a family. Every program has an important message.

"Zoobilee Zoo" with Ben Vereen is another example of our commitment to enhance the quality of children's programming to our viewers, every day leaving our youngsters with an important message not only through words but also through music.

MINORITY PROGRAMS

- "Julia" - the story of a single black mother and her son experiencing the hardships of growing up.
- "Soul Train" - A weekly music program focusing on the latest from the "Soul" charts.
- "Essence, The Television Program" - a weekly half-hour magazine-format program with hosts Susan Taylor and Jose Luciano featuring interviews with major Black celebrities.

• "Carrascolendas" - A program aimed toward Hispanic children to affirm their cultural values. This all takes place in the magical town called "Carrascolendas".

• "Sonrisas" - A program for all ages. The show deals with everyday problems experienced by children and adolescents of various hispanic cultures.

• "Villa Alegre" - Uses a magazine format that blends live characters, film and animation to present a wide-ranging and challenging curriculum to youngsters of all social backgrounds.

• "Que Pasa, U.S.A." - A program about a three-generation Cuban-American family trying to bridge the generation gap.

• Reverend Price Religious Service - A weekly service broadcast on Sunday morning.

Not only has WHCT-TV18 made a commitment to minority programming airing the only regularly scheduled bilingual programs in the state of Connecticut, but during the month of January 1986 WHCT-TV18 aired a six-part special entitled "Martin Luther King". WHCT-TV18 has also aired such specials as:

• "Best Of The Superfest" - A kick-off of a series of concerts benefiting the United Negro College Fund. Hosted by Lou Rawls.
• "Essence: Television Superstars"
• "Essence: Music's Black Superstars"

During the month of February 1986, as a celebration of "Black History Month", WHCT-TV18 undertook a project to feature famous black artists and aired 60-second spots for the entire month, as a tribute to these fine leaders. As a tribute to black entertainers, for the entire month of February WHCT-TV18 aired movies featuring such stars as Harry Belafonte, Ruby Kieler, Ozzie Davis, Flip Wilson, Sammy Davis, Jr., Sidney Poitier, Lena Horne, James

Brown, Cab Calloway, Ben Vereen, Julius Erving, Meadowlark Lemon. Not only does WHCT-TV18 have a strong commitment to minority programming now and for years to come, but it also includes a commitment to the airing of Public Service Announcements in Spanish as well. WHCT-TV18 is the only television in the state of Connecticut that has made a significant contribution to the Hispanic community.

LOCALLY PRODUCED

In the short year that WHCT-TV18 has been on the air, we have made great progress in the production of locally produced programs such as:

• *The Hartford Whalers* - The only professional sports franchise in the state of Connecticut. Twenty-four games produced by WHCT-TV18 for the 1986-1987 season.

• *University of Hartford Hawks* - Eleven basketball games being produced by WHCT-TV18 for the 1986-1987 season.

• *Pepsi Duckpin Challenge* - A weekly hour of exciting bowling action sponsored by the Connecticut Bowlers Association.

• *One Goal Away* - a half-hour special featuring the Hartford Whalers.

WHCT-TV18 airs more local sports than any other television station in the state of Connecticut.

Not only does WHCT-TV18 produce local sports, but also, in conjunction with the Archdiosese of Hartford, produces a live mass, every day, Monday through Friday 9:00AM-9:30AM for our own television studios. I believe that this is the only mass being aired "live" in the country.

MISCELLANEOUS PROGRAMS

Not only has WHCT-TV18 made a commitment to children's programming, minority programs, and local pro-

grams, and local programming, but inorder to keep our viewing audience informed on the latest news around the world during the past year, we have acquired the rights to such programs as:

- Independent Network News - daily news service
- CNN Headline News - 24-hour news service
- AGDAY - daily agricultural news service
- Ask Washington - a daily call-in dialogue between today's leaders and TV viewers nationwide, covering topics ranging from money mattersand medical care to the latest in business and political trends.
- Wall Street Journal Report - A weekly half-hour program featuring reports on people, technology, financial matters, and a look at changing America.

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

and

ASTROLINE COMMUNICATIONS COMPANY,
Intervenor.

MOTION OF INTERVENOR ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP TO SUPPLEMENT THE RECORD

Astroline Communications Company Limited Partnership ("Astroline"), through counsel, hereby files this Motion to Supplement the Record with the attached letter to Mr. William J. Tricarico, Secretary, Federal Communications Commission, dated October 16, 1986.

The letter updates the Federal Communications Commission on the operation of WHCT-TV (Channel 18), Hartford, Connecticut. As was noted in an earlier supplement filed over a year ago on October 23, 1985, the station went off the air to upgrade its facilities and acquire new programming, and then returned to the air on September 30, 1985, with a full 18 hours program schedule. Since returning to the air over a year ago, Astroline has spent an additional ten million dollars ($10,000,000.00) and done a lot to diversify the programming choices available to the

viewers in the Hartford area. In view of the inordinate delay in resolving this litigation and the current inquiry concerning the constitutionality of the Commission's distress sale policy, the record before this Court would be incomplete and inaccurate unless it also included WHCT-TV's recent record of broadcast service and operation.

Respectfully submitted,

/s/ Thomas A. Hart, Jr.
Thomas A. Hart, Jr.
Lee H. Simowitz

BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
(202) 861-1500

Attorneys for Intervenor Astroline Communications Company Limited Partnership

Date: October 16, 1986

BAKER & HOSTETLER
ATTORNEYS AT LAW
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(202) 861-1500

October 16, 1986

BY HAND

Mr. William J. Tricarico
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Status Report of WHCT-TV (Channel 18); Hartford, Connecticut

Dear Mr. Tricarico:

Astroline Communications Company Limited Partnership ("ACC"), through counsel, hereby updates its earlier letter to you, dated September 30, 1985, regarding the status of WHCT-TV (Channel 18), in Hartford, Connecticut. As you may recall, Astroline purchased WHCT from Faith Center, Inc. pursuant to the FCC's Distress Sale Policy on January 23, 1985. Astroline then took the station off the air and resumed full-time broadcast on WHCT on September 30, 1985. At that time, Astroline had expended approximately $7 million in renovating the station and acquiring programming.

We are pleased to inform you that Astroline recently celebrated its first anniversary of full-time broadcast service on WHCT. Astroline has completed its studio renovation and has developed a full film library of top quality programs. Over the past year, Astroline has done much to diversify the programming currently available in the Hartford community.

The programming of Astroline over the past 12 months, as the new licensee of WHCT-TV, Hartford, Connecticut, show, in this case, that minority ownership leads to diversity of programming. Although 20.4% of the Hartford community is Hispanic, until Astroline became the licensee of WHCT-TV, no television station aired regularly scheduled bilingual programs in the State of Connecticut. WHCT-TV is committed to airing bilingual programming and already regularly broadcasts four scheduled bilingual programs: "Carrascolendas," a program aimed toward Hispanic children; "Sonrisas," a program that deals with everyday problems experienced by children and adolescents of various Hispanic cultures; "Villa Alegre," a magazine format program that blends live characters, film and animation to present a wide ranging and challenging curriculum to youngsters of all social backgrounds; and "Que Pasa, USA," a program about a three-generation Cuban-American family trying to bridge the generation gap.

WHCT-TV is also committed to providing minority programming in general, since, in addition to the Hispanics in Hartford, 33.9% of the population in the Hartford area is Black. WHCT-TV regularly broadcasts "Julia," the story of a single Black mother and her son experiencing the hardships of growing up; "Soul Train," a weekly music program focusing on the latest from the soul charts; and "Essence, The Television Program," a weekly half-hour magazine format program featuring interviews with major Black celebrities. Also, WHCT ran various specials throughout the year that focused on minority individuals or organizations. WHCT-TV has also increased diversity and competition in non-minority programming, by airing special children's and sports programming. The station airs more local sports than any other television station in the State of Connecticut. WHCT-TV's sports programming includes broadcasting the Hartford Whalers' hockey games; the University of Hartford Hawks' basketball games; and the Connecticut Bowlers Association's games. In addition,

WHCT-TV has produced a half-hour special featuring the Hartford Whalers. Thus, the distress sale of WHCT-TV in Hartford, Connecticut, has led to increased competition and diversified programming in the Hartford area.

The initial staff referred to in our September 30, 1985 letter has grown to over forty employees and Astroline has continued its record of employing women and racial minorities in senior management positions.

Since January 1985 Astroline has now expended in excess of $17 million in private capital through its first year of operation. The construction permit referred to in the earlier letter has been granted by the Commission and Astroline has begun constructing a $2.7 million 1300-foot tower to further enhance its ability to serve the citizens of the Hartford area. If you have any questions concerning this letter, please contact the undersigned.

Sincerely,

/s/ Thomas A. Hart, Jr.
Thomas A. Hart, Jr.

Before the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC.
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ASTROLINE COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP,
Intervenor

CONTINGENT MOTION OF SHURBERG BROADCASTING OF HARTFORD, INC. FOR LEAVE TO SUBMIT COMMENTS

Appellant Shurberg Broadcasting of Hartford, Inc. ("SBH") hereby moves, on a contingent basis, for leave to submit the following comments relative to the "Motion of Intervenor Astroline Communications Company ["Astroline"] to Supplement the Record". Astroline's Motion was filed with the Court on October 17, 1986.

As set forth in SBH's Opposition to Astroline's Motion, which is being filed simultaneously herewith, SBH believes that Astroline's Motion is completely unwarranted and, indeed, inappropriate, and that it should be denied. If the Court agrees with SBH and rejects Astroline's Motion, then SBH will withdraw the instant Motion and no further consideration need be given to it. However, if the Court disagrees with SBH with respect to Astroline's Motion, SBH submits that, at a minimum, SBH is entitled to address the substance of Astroline's Motion (and the letter

accompanying it) in order to place it in an objective and meaningful context. The following comments are intended for that purpose.

In its Motion, Astroline alleges that, since September 30, 1985, it has spent ten million dollars and "done a lot to diversify the programming" available in the area of Hartford, Connecticut.[1] In the letter accompanying the Motion, Astroline's counsel offers a variety of allegations concerning Astroline's employment practices since September 30, 1985, Astroline's investment in station operations since that same date, the programming which Astroline airs, and the programming otherwise available to the Hartford audience.[2]

Astroline's Employment Practices

This proceeding involves the validity of a Commission action taken almost two years ago. It has been fully briefed and argued by all parties; indeed, oral argument was held more than nine months ago. At no point in the Commission's Memorandum Opinion and Order below, or in any of the pleadings or oral presentations of SBH, the Commission or any other party before this Court, has it been suggested that Astroline's employment practices, or employment practices in general in the broadcast industry, have any relevance whatsoever to this proceeding.

It should also be noted that, to the extent that Astroline makes claims concerning its own record of employing minorities, SBH is willing to commit that, within two years of obtaining the Station WHCT-TV license, it will be able

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[1] As the Court is aware, this case involves contested claims to the license of Station WHCT-TV, Hartford, Connecticut.

[2] Astroline offers no supporting declaration or affidavit relative to the various allegations set forth in its Motion and accompanying letter. Attached hereto is a Declaration, prepared under penalty of perjury, in support of the factual statements made in SBH's instant Contingent Motion.

to make the same claims relative to minority representation at all levels of station employment.

Astroline's Investment

The question of Astroline's investment, and the potential loss thereof, has been specifically foreclosed from consideration herein. Immediately following the Commission's action granting Astroline's application to purchase Station WHCT-TV, SBH requested that this Court stay the effectiveness of that action. SBH argued in part that unless a stay were granted, Astroline might choose to close the sale. In that event, SBH asserted in support of its stay request, Astroline might suffer significant harm:

> Astroline has indicated that it intends to make substantial improvements to the station at significant costs over and above the station's purchase price. Any such costs it might incur would presumably be noncompensable (although Astroline would, again presumably, be able to sell off, possibly at a loss, any equipment it might obtain). In view of these factors, it appears to be in Astroline's interest to await the outcome of SBH's appeal before going forward.

SBH's Emergency Motion for Stay at 41-42.

In response to SBH's motion, the Commission asserted that SBH was suffering from a "total misunderstanding of what would happen" if SBH were to prevail on appeal. At page 4 of its Opposition to SBH's Motion the Commission stated:

> The [Commission] has made clear in the past that parties who act in reliance on agency decisions before they have become final and beyond reconsideration by the Commission or review by the courts, do so at the risk that they may have to reverse that action. . . . If the Commission's orders were to be reversed on appeal, whatever action was taken in reliance on the orders could and would be undone.

> If [SBH] should prevail on review, Astroline will be required to return the license to Faith Center.

Id. at 4-5 (citations omitted).

For its part, Astroline addressed SBH's argument as follows:

> If [SBH] ultimately prevails on the merits on appeal, Astroline would be compelled to divest its interest in WHCT-TV. . . . Astroline, not [SBH], incurs the entire risk of proceeding with the purchase and operation of station WHCT-TV.
>
> * * *
>
> [SBH]'s paternalistic argument that a stay will protect Astroline's interest by mitigating the potential need to "unscramble the egg" is disingenuous, at best. . . . Astroline desires to consummate the purchase as soon as possible. In so doing, Astroline is willing to undertake the potential risk that it might suffer some economic loss should it not prevail on the appeal.

Memorandum of Intervenor [Astroline] in Opposition to Appellant's Emergency Motion for Stay at 14-15.

The Court denied SBH's Emergency Motion for Stay by Order filed on December 21, 1984. It stated that "if [SBH] is ultimately successful on its appeal, the Commission could provide complete relief to [SBH] because the successful licensee would take the license subject to judicial review." Order at 2.

Thus, it is clear that Astroline's potential exposure to significant losses if it chose to close prior to resolution of this appeal was squarely raised by SBH, addressed by the Commission and Astroline, and resolved by the Court. Astroline explicitly and expressly acknowledged that it "was willing to undertake the potential risk" that it might suffer

economic loss by purchasing the station prior to final resolution of SBH's appeal. Astroline's post-closing expenditures are therefore totally irrelevant to this proceeding.

And even if Astroline had not clearly conceded that any *post hoc* investments it might make would be made at its own risk, it must further be noted that the question of investment in station operations was not addressed in the Commission's Memorandum Opinion and Order below, and it has not been advanced in support of the Commission's action by any party hereto. It is, therefore, completely irrelevant to this proceeding.

Programming

The question of programming as a general concept may be relevant to this proceeding. Both before the Commission and before this Court, SBH has consistently challenged the validity of the Commission's "distress sale policy". The Commission and Astroline have both defended that policy on the theory that a race-based policy intended to increase the level of minority ownership in the broadcast industry will perforce lead to increased representation in the broadcast media of the "views of racial minorities." *See* Commission *MO&O*, J.A. I at 6; *see also* Commission Brief at 29-32 ("[T]he minority ownership policies are based principally on the Commission's authority . . . to encourage diversity of programming. . . ."); Astroline Brief at 26-39.

Recently, however, the Commission submitted a brief to this Court in *Steele v. FCC*, Case No. 84-1176, in which it has expressly disavowed that position. There the Commission expressly stated that

> First, no record has been established demonstrating that a race- or gender-based preference scheme to increase minority and female ownership is essential to achieving th[e] objective [of expanding diversity of broadcast programming]. . . . Second, no record has been established on which to base an assumption that a nexus exists between an owner's race or gender and program diversity.

Commission Brief in *Steele v. FCC* (rehearing *en banc*), at 19. The Court in the instant proceeding has ordered the Commission to submit a supplemental brief in this case discussing the constitutionality of the "distress sale policy" in light of the position taken in the *Steele* brief.

SBH suspects that Astroline's goal in submitting its letter to the Commission and to the Court was to create some basis for an argument that the Commission's action below did in fact enhance diversity of programming. Such an argument is otherwise completely unavailable to Astroline, since the Commission has, in *Steele*, acknowledged that it had no general record support for its position, and further since the specific record which was before the Commission at the time it acted in this proceeding was devoid of any information concerning Astroline's actual or proposed programming. Thus, Astroline is apparently seeking anticipatorily to shore up its now-unsupported position.

As a threshold matter, SBH takes exception to Astroline's attempt to develop a supporting record almost two full years *after* the Commission's *MO&O* under review here. Of course, an agency decision must be sustainable, if at all, on the basis of the record before the agency at the time it made its decision, and not some new record made in the reviewing court. *E.g., FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976); *Motor and Equipment Manufacturers' Association, Inc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (MacKinnon, J.). Thus, Astroline's description of programming which it did not even begin to broadcast until ten months *after* the Commission's decision cannot properly be considered here.

But even if Astroline's *post litem motam* programming is considered, it is clear that that programming affords no support for the claim that the "distress sale policy" will

create diversity of programming. To the contrary, Astroline's showing demonstrates the *in*validity of that claim.

Astroline first claims that, prior to January 24, 1985, "no television station aired regularly scheduled bilingual programs in the State of Connecticut." Astroline Letter at 1. If Astroline intends this to mean that only English-language programming was available over-the-air to Hartford-area television viewers prior to that date, Astroline is factually wrong. Channel 47, Hartford, has been providing full-time Spanish-language television programming to Hartford for some five years or more. Further, Channel 13, also licensed to Hartford, has recently commenced operation and is also providing substantial blocks of Spanish-language programming amounting to approximately five hours per day. Additionally, Channel 30 and Channel 61—both of which are licensed to Hartford—provide both English- and Spanish-language programming to the Hartford area. Thus, even if Astroline does now provide some limited, non-local Spanish-language programming, such programming is already otherwise available to the Hartford audience, and it cannot accurately be said that Astroline is contributing in any unique way to the diversity of available programming. This is especially so where the Spanish-language programs broadcast by Astroline do not appear to be locally-produced and, instead, appear to be syndicated programming generally available to any broadcast licensee, whether or not minority-controlled.

Second, Astroline points with apparent pride to its "minority programming", by which it apparently means programming of particular interest to Blacks. As an initial, conceptual, matter, this aspect of Astroline's presentation effectively undermines the traditional argument in support of the "distress sale policy". After all, if a company purportedly controlled by a Hispanic individual can provide programming of particular interest to Blacks, why should not a non-minority licensee be expected to be able to do precisely the same? In other words, the notion that "minority ownership leads to peculiarly minority programming" appears to hold water, if at all, only when the minority group to which the station's owner belongs happens to be the group to which the station's programming is directed. As soon as it is acknowledged that an owner of a particular racial or ethnic heritage is capable of providing programming for an audience of a separate racial or ethnic heritage, then the basic underpinning of any minority ownership preference disintegrates.

But even more surprising is the particular "minority programming" to which Astroline points: "Julia", "Soul Train", and "Essence, The Television Program". "Julia" is a syndicated program first produced by 20th Century Fox for broadcast on the NBC Television Network from September, 1968 to May, 1971. Thus, it is not a program locally produced by Astroline. It is not a program produced by a minority-owned company. And it is a program which was broadcast on a national network, irrespective of whether the network affiliates were controlled by minorities or non-minorities. As a result, it is difficult to fathom how the broadcast of "Julia" can be seen to result in any minority-related diversity which could not have been accomplished by, for example, a grant of SBH's application. It is even more difficult to fathom how the broadcast of "Julia" is supportive of the "distress sale policy" in light of the fact that the program was first produced, and broadcast nationally, more than seven years *before* the creation of the "distress sale policy".

"Soul Train" is a music and dance program akin to "American Bandstand". Again, it is not locally produced by Astroline. While it may be produced by a minority-owned company, it is difficult to claim that its "content" is of peculiar interest to Blacks. The audio "content" of the program consists almost exclusively of popular music, and the video "content" consists of young people dancing to that music. While the majority of dancers and recording artists featured on the program may be Black, it is difficult

to understand why this program should be perceived as being of any peculiar or particular interest to minorities. Any possible explanation (*e.g.*, "Blacks have a heightened interest in popular music and dance") would arise more from a simplistic, and distasteful, racial stereotype than from any valid and defensible consideration.

"Essence, The Television Program" is described by Astroline as being a weekly half-hour "magazine format program featuring interviews with major Black celebrities." Again, the program is not locally produced by Astroline. There is no indication whatsoever that this is anything more than an entertainment program which focusses on Black celebrities, celebrities who would very likely be of equal interest to Blacks and non-Blacks. There is no indication whatsoever that this program would not be both available to and broadcast by non-minority licensees.

Astroline also touts its sports programming. Quite frankly, SBH understands the Court's and the Commission's historical interest in "diversity of programming" to entail something more than professional hockey games, college basketball games, and bowling matches entitled "Pepsi Duckpin Challenge", even if such programming were not otherwise abundantly available.[3] To the extent that Astroline is forced to rely on such programming in support of its claim that it has "done a lot to diversify programming choices", SBH submits that SBH could, and would, commit itself to providing at least as much diversity, and probably significantly more.

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[3] It goes without saying that even a cursory scanning of network television listings demonstrates the plethora of sports programming already available nationally.

Respectfully submitted,

/s/ Harry F. Cole
Harry F. Cole

Bechtel & Cole, Chartered
2101 L Street, N.W.
Suite 502
Washington, D.C. 20037
(202) 833-4190

Counsel for Shurberg Broadcasting
of Hartford, Inc.

Drafted: October 21, 1986
Filed: October 23, 1986

DECLARATION

Alan Shurberg, under penalty of perjury, hereby declares the following to be true and correct of his own personal knowledge:

1. I am the sole stockholder, officer and director of Shurberg Broadcasting of Hartford, Inc., the Appellant in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, Case No. 84-1600, which is presently pending before the United States Court of Appeals for the District of Columbia Circuit. I am preparing this Declaration for submission to the Court in connection with a Contingent Motion of Shurberg Broadcasting of Hartford, Inc. for Leave to Submit Comments ("Contingent Motion").

2. I have reviewed the Contingent Motion and I hereby affirm that the factual statements set forth therein are true and correct.

/s/ Alan Shurberg
Alan Shurberg

Date: 10/22/86

ORAL ARGUMENT HELD ON JANUARY 8, 1986

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION
Appellee

ASTROLINE COMMUNICATIONS CO.,
Intervenor

MOTION FOR REMAND

Appellee Federal Communications Commission respectfully moves the Court to remand the record in the captioned case for further consideration in connection with the Court's recent remand in *Steele v. FCC*, No. 84-1176.

Appellant in this case seeks review of a Commission order authorizing a "distress" sale of a television station to a minority controlled buyer. Under the distress sale policy only certain persons or companies, namely members of certain minority groups and certain minority-controlled companies, are eligible to buy a station. *See Policy On Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978); *Minority Ownership In Broadcasting*, 92 F.C.C.2d 849 (1981). Appellant in this case has challenged the constitutionality of this policy.

In its brief on rehearing *en banc* in *Steele v. FCC*, the Commission asked the Court to remand for further consideration of both racial and gender preferences utilized in the Commission's comparative licensing process. The

Commission explained that as it understood recent Supreme Court decisions, racial and gender preferences are constitutionally suspect and must be based on an exceedingly persuasive justification, which requires that a factual record be established. The Commission concluded that in the case of comparative preferences based on race and gender, it had never conducted a factual inquiry to ascertain whether there was a nexus between preferences and diversity of programming. The Commission announced that if the Court were to remand in *Steele*, it intended to institute a proceeding to collect evidence and examine this issue. *See Public Notice*, FCC 86-387 (Sept. 15, 1986). On October 9th, the Court issued an order of remand in *Steele*.

The distress sale policy raises many of the same questions that are present in the *Steele* case. Because the Commission now intends to undertake a proceeding to ascertain whether there is an adequate justification for the policy of granting comparative preferences based on race and gender, it seems appropriate also to reexamine the justifications for the distress sale policy.

The Commission understands that intervenor Astroline, the distress sale buyer in the present case that is currently operating the station, has made a substantial financial commitment toward facilities and programming to provide service to the community. Because of this good faith reliance on the policy and the present uncertainty in this area, it appears appropriate to maintain the status quo in this case pending further developments. Therefore, unless otherwise instructed by the Court, upon remand the Commission proposes to allow Astroline to continue to operate the station during the inquiry that will be conducted.

In consideration of the foregoing, we respectfully move the Court to remand the record in the captioned case for further consideration.[1]

[1] In an order of September 18, 1986, the Court directed that the Commission file a supplemental brief in this case indicating its current position as to the constitutionality of the distress sale policy. This pleading is intended to reflect the Commission's current position as to the distress sale policy, and we ask the Court to accept this pleading in lieu of a supplemental brief.

Respectfully submitted,

Jack D. Smith,
General Counsel

Daniel M. Armstrong,
Associate General Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 632-7112

October 23, 1986

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-484

In the Matter of

Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications

NOTICE OF INQUIRY

Adopted: December 17, 1986;
Released: December 30, 1986

By the Commission: Commissioner Quello issuing a separate statement.

INTRODUCTION

1. Over the past decade, the Commission has administered three regulatory policies designed to achieve diversity in broadcast programming by fostering an increase in the number of broadcast facilities owned by minority group members and women. These policies are, first, the application of racial, ethnic, and gender preferences in comparative licensing proceedings for broadcast stations; second, the administration of the Commission's distress sale policy to permit minority acquisition of broadcast stations designated for hearing on basic qualifications issues; and third, the issuance of tax certificates for sales of broadcast properties to minorities. This proceeding was prompted by concerns as to the continuing legality of these

policies as a result of the *Steele* case[1] and several recent Supreme Court cases. The Commission asked for a remand in order to determine whether a record can be established that would support the constitutionality of its preference scheme. The Commission also has decided that this is an appropriate occasion to determine whether comparative preferences, distress sales and tax certificates are appropriate as a matter of policy.

BACKGROUND

A. Comparative Preference Policies for Minorities and Women.

2. In a comparative licensing proceeding, the Commission selects the applicant best able to serve the public interest. *See, e.g., Johnston Broadcasting v. FCC*, 175 F.2d 351 (D.C. Cir. 1949). To make this choice, the Commission has set out standard criteria to be considered in every comparative proceeding. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) [hereafter *1965 Policy Statement*]. The Commission explained in the *1965 Policy Statement* that there are two principal objectives on which it would focus in selecting among qualified applicants: (1) best practicable service to the public; and (2) maximum diffusion of control of the media of mass communications, generally referred to as diversification, in order to maximize diversity of programming. *Id.* at 394. *See generally West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 603-07 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1392 (1985). Integration of ownership and management is the single most important factor in evaluating best practicable service. Certain qualitative attributes of participating owners, such as local residence, participation in civic activities and broadcast experience have been used to enhance integration credit. *Id.* at 395-96.

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[1] *Steele v. FCC*, Case No. 84-1176 (D.C. Cir. *motion for remand granted* Oct. 9, 1986).

3. Minority and female ownership were not specifically addressed in the *1965 Policy Statement*. Instead, the Commission's current comparative preference policies had their origin in the Court of Appeals decision in *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). *See also Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975). In *TV 9*, the Court stated that "we hold that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." The Court, however, reversed the Commission's decision that minority preferences should be granted only after the minority applicant demonstrated a nexus to program diversity. The court concluded that it could be assumed that minority ownership would foster program diversity when there is integration of ownership and management. It therefore found that the Commission should have awarded merit to the minority owner in *TV 9* without first requiring a demonstration of a nexus between minority ownership and increased program diversity.[2] In 1975 in *Garrett*, the court clarified its *TV 9* holding, stating that the "entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of black citizenry and that 'reasonable expectation' without 'advance demonstration' gives them relevance." *Id.* at 1063. *See also West Michigan Broadcasting Co.*, 735 F.2d at 606-616. Based on these directives from the court, the Commission concluded that minority ownership and participation should receive credit in the comparative process; it decided to treat this factor as an enhancement to the standard comparative criterion of integration of management, an element used to evaluate which competing ap-

[2] For the Commission's decision, see *Mid - Florida Television Corp.*, 33 FCC 2d 1, 17-18 (Rev. Bd.), *rev. denied*, 37 FCC 2d 559 (1972). Unless modified otherwise, references to "diversity" herein refer to program diversity.

plicant is likely to provide the best practicable service to the public. *WPIX, Inc.*, 68 FCC 2d 381 (1978).[3]

4. In a subsequent decision, the Commission's Review Board applied the preference policy to women, concluding that "merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser significance." *Mid - Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981). Finding the rationale of *TV 9* and *Garrett* applicable to women as well, the Board concluded that, if it were correct to assume that minority ownership promotes diversity, then the goal of diversification of programming would by the same logic likely be furthered by a policy that gives some comparative credit for female ownership of broadcast stations, given that women, like minorities, were infrequent owners of broadcast operations. However, based on the observation that women, unlike minorities, had not been "excluded from the mainstream of society" due to prior discrimination, the merit accorded integrated female ownership is of lesser weight than that awarded minority ownership.[4] The Board followed the court's ruling in *TV 9* and did not require a showing of a nexus between female ownership and program diversity before awarding the preference.

5. Minority and female preference policies have been applied in numerous cases. In *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643 (Rev. Bd. 1983), *reconsid. denied*, 94

[3] The *TV 9* opinion and supplemental opinion were careful to point out the difference between a "preference," which the court viewed as determinative *per se*, and an "enhancement" or "merit," which was not. The Commission's implementation of the *TV 9* order in the *WPIX* case was intended to observe this distinction. For ease of discussion herein, the term "preference" shall be deemed to encompass both enhancement and merit, without legal distinction.

[4] *Mid - Florida, supra* at 652.

FCC 2d 72 (Rev. Bd. 1983), *review denied*, FCC 84-161 (April 13, 1984), *appealed sub nom. Steele v. FCC*, No. 84-1176 (D.C. Cir. *motion for remand granted*, Oct. 9, 1986), a comparative application proceeding for a new FM broadcast station, the Commission's Review Board found that, between two competing applicants, neither of whom owned any other media properties and both of whom were to be sole owner-operators of the station, the woman's qualitative enhancement credits for 100% female integration and past local residence prevailed over the nonminority male applicant with an enhancement for prior broadcast experience. The Commission affirmed this decision and the losing applicant appealed, challenging the constitutionality of the female preference policy.

6. A majority of a divided three-judge panel of the Court of Appeals held that the gender preference was invalid because it exceeded the Commission's statutory authority. *Steele v. FCC*, 770 F.2d 1192, 1199 (D.C. Cir. 1985), and it reversed the Commission's decision. The majority stated that the assumptions underlying the preference policies "run counter to the fundamental constitutional principle that race, sex, and national origin are not valid factors upon which to base government policy." *Id.* at 1198. The majority added:

> [T]he Commission has been unable to offer any evidence other than statistical underrepresentation to support its bald assertion that more women station owners would increase programming diversity. Instead, a few Commission employees without any evidence, reasoning, or explanation, gratuitously decreed one day that female preferences would henceforth be awarded. . . . Presumably, the Board thought that it was a Good Idea and would lead to a Better World. Contrary to the Commission's apparent supposition, however, a mandate to serve the public interest is not a license to conduct experiments in social engineering conceived seemingly by whim and rationalized by conclusory data.

770 F.2d at 1199.

7. The court, *en banc*, granted a rehearing and vacated the panel opinion in an order released October 31, 1985. In a subsequent order on November 22, 1985, the court asked the parties to file supplemental briefs addressing the Commission's statutory authority to grant gender-based preferences and the constitutionality of such grants. The Commission responded with a brief that expressed its concern that both the female and minority preference policies do not at present satisfy statutory and constitutional requirements, because the Commission had never undertaken a proceeding to determine whether there is a nexus between the preference scheme and enhanced diversity, but instead had assumed such a nexus. At the same time, the Commission sought a remand so that it could conduct such a proceeding. *Steele v. FCC*, No. 84-1176 (D.C. Cir. *motion for remand filed* Sept. 12, 1986). That motion was granted in an order released October 9, 1986.

B. Tax Certificate and Distress Sale Policies

8. Applying the reasoning of *TV 9* and in response to concerns raised in the Federal Communications Commission's Minority Ownership Task Force, *Minority Ownership Report* (1978), the Commission has adopted two additional minority ownership policies to encourage broadcasters to seek out minority purchasers. *Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 982-983 (1978). First, the Commission used its authority under 28 U.S.C. §1071 to grant tax certificates to assignors or transferors whose voluntary sales of their broadcast stations would increase minority ownership where it determined that "there is substantial likelihood that diversity of programming will be increased." *Id.* The Commission contemplated issuing tax certificates where

minority ownership would be controlling, and it would consider issuing certificates in other cases where "minority ownership [would be] significant enough to justify the certificate in light of the purpose of the policy. . . ." *Id.* at 983 n.20.[5] Section 1071 authorizes the Commission to issue tax certificates whenever a sale of a broadcast property is found to be "necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to ownership and control of radio broadcasting stations." Tax certificates allow the seller to defer capital gains taxation on the proceeds of the sale.

9. Second, the Commission extended its existing distress sale policy, which as originally adopted allowed incapacitated or bankrupt broadcasters to sell their stations, to include distress sales to prospective purchasers with significant minority ownership interests. *Id.* at 983. Under this policy, the Commission permits a licensee whose license or whose renewal application is designated for hearing on basic qualifications issues to transfer or assign its license to a qualified minority applicant at a distress sale price, if the sale occurs before the hearing is initiated and the parties "demonstrate how the sale would further the goals" underlying the policy. *Id.* The goals are described simply as "fostering the growth of minority ownership," *id.* at 982, because of the assumption in *TV 9* that minority ownership and participation in management can be expected to increase diversity of program content as well as diversity of control of the media. *Id.*[6]

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[5] *See Policy Regarding the Advancement of* Minority Ownership in Broadcasting, Gen. Docket No. 82-797, 92 FCC 2d 849 (1982), regarding the availability of tax certificates for limited partnerships and "start-up" financing.

[6] In a Notice of Inquiry in MM Docket No. 85-299, the Commission proposed to permit distress sales of broadcast properties to minorities after a revocation or renewal hearing has commenced, provided the transaction is entered into prior to the filing of proposed findings of fact and conclusions of law and the sale price is no more than 50 percent of the fair market value. Distress Sale Policy for Broadcast Licenses, 50 Fed. Reg. 42047 (1985). Because the issues there will be affected by the Commission's decision in this proceeding, we will hold in abeyance our consideration of MM Docket No. 85-299 until this proceeding is concluded.

10. The application of this distress sale policy is the subject of a pending appeal in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir. *supplemental brief ordered* Sept. 18, 1986). Recognizing that the minority distress sale policy may implicate some of the same statutory and constitutional concerns as the comparative preference policy in *Steele*, the Commission asked the court to remand *Shurberg* for further Commission consideration after the Commission's Motion for Remand of the *Steele* case was granted. The Motion for Remand, filed October 23, 1986, is pending before the court.

11. The minority tax certificate policy, adopted in the same decision as the distress sale policy, was premised on the same diversity assumption, and therefore must necessarily be addressed in the instant proceeding.

C. Commission Concerns

12. The Commission adopted its policies fostering minority ownership and applied racial and gender preferences in comparative hearings to respond to the court's mandates in *TV 9* and *Garrett, supra,* that the FCC should assume that minority ownership affects content diversity. Thus, in compliance with the court's holdings, the Commission has applied its comparative policy solely on the basis of the amount of minority or female ownership reflected in management. Likewise, the Commission, in its *Policy on Minority Ownership of Broadcasting Facilities, supra,* based its distress sale and tax certificate decisions on the nature of the minority interests, *i.e.*, whether they were controlling.

13. As indicated previously, the Surpreme Court decided several cases involving affirmative action programs that may implicate the Commission's comparative preference, minority distress sale and minority tax certificate programs. *See, e.g., Wygant v. Jackson Board of Education*, 90 L. Ed. 2d 260 (1986); *Fullilove v. Klutznik*, 448 U.S. 448 (1980); *Regents of University of California v. Bakke*, 4438 U.S. 265 (1978). *See also Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) ("heightened scrutiny" applied to gender-based classifications). Although these cases are primarily concerned with quota or set-aside affirmative action remedies for past discrimination,[7] collectively these cases at a minimum establish the proposition that classifications based on race or sex are inherently suspect, presumptively invalid, and subject to strict or heightened scrutiny. Because there is no factual predicate against which to apply such cases, the Commission has initiated this proceeding to reexamine its policies based on racial or gender classifications and preferences.

14. As stated previously, the purpose behind each of these policies has been to expand program diversity. We find program diversity compelling governmental interest within the Commission's authority. Although we do not interpret the Supreme Court opinions to preclude consideration of race or gender in the licensing process under all circumstances, we do read these cases to mean that the use of minority/gender status must include a determination of whether their use is necessary and narrowly tailored to achieve their goals. The Commission's brief concluded, in response to the *Steele* court's questions, that racial or gender classifications may not be based on the assumption alone that integrated minority/female owners will result in increased content diversity. The Commission concluded, therefore, that an inquiry should be conducted

[7] In Bakke, Justice Powell addressed the University's interest in selecting a diverse student body, 438 U.S. at 315.

to reexamine the legal and factual predicates of our policies. To this end, we seek to determine whether there is a nexus between minority/female ownership and viewpoint diversity, and whether such ownership is necessary to achieve this goal. The questions that follow are designed to elicit evidence on these points. They are also designed to focus attention on the effectiveness of these policies in achieving their intended goals and on other alternatives the Commission might or should consider. We also seek to determine whether, as a matter of policy, these preference schemes should be retained.

SPECIFIC QUESTIONS AND REQUEST FOR COMMENTS

I. THE CONSTITUTIONALITY OF THE POLICIES

15. The overarching question that must be addressed is, of course, whether the preference, distress sale, and tax certificate policies as presently constituted and administered are constitutional. In addressing this question, commenters should submit analyses of relevant case law in support of their reasoning and specific data to support their factual conclusions. In the course of this analysis, particular consideration of the questions outlined below also will be helpful.

16. The "strict scrutiny" test applied in cases involving race classifications and the heightened scrutiny test applied in gender classifications require that government actions be premised on a clearly established factual record. Furthermore, in assessing the constitutionality of race or gender-conscious remedies, courts have required that the remedy chosen be "narrowly tailored" to achieve the government's legitimate, articulated purpose. In assessing these issues, commenters should focus on the following questions.[8]

[8] Commenters should be as specific as possible in presenting data supporting their responses. We encourage parties to submit original

a. Is a demonstrated relationship between minority/female ownership and minority/female-oriented programming necessarily required as a matter of law to support the constitutionality of the Commission's comparative preference, distress sale, and tax certificate policies? If not, please cite relevant case law in support of this position. Are there any circumstances under which such a relationship can be presumed? On what basis? May the Commission rely upon reasonable expectation or its own expert judgment on these matters, even in part? Is increased minority or female ownership in and of itself a sufficient governmental interest and does it pass constitutional muster?

b. To what extent is the relationship between integrated minority/female ownership and increased availability of minority/female perspectives and programming empirically demonstrable? Is there, for example, a demonstrable difference in the amount or nature of minority-oriented programming broadcast by minority-owned stations and that broadcast by nonminority-owned stations under similar market conditions, such as where there is a significant minority population? How should minority or female-oriented programming be defined for purposes of this analysis? Do these definitions apply to all media?

c. Is the evidence relating to the nexus between ownership and programming any different when

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empirical studies to support their positions. Where such analyses are submitted, the methodologies employed should be described in detail. Studies submitted should attempt to control for other factors which may also affect viewpoint diversity, such as market size or demographic characteristics. We recognize, of course, that not all of these questions raise issues that are susceptible to empirical study, but for those that are, we would ask commenters to submit the best data available.

minority and female ownership are combined with significant management roles, as is required under the comparative preference policy, as contrasted with ownership that is not integrated into management, as is permitted under the tax certificate and distress sale policies?

d. The Supreme Court precedent suggests that a higher level of scrutiny may apply to race-based classifications than to gender-based classifications. If that is true, what is the effect of this difference on the constitutionality of our policies?

17. Equal protection concerns generally require that there be no reasonable way to achieve the state's goals by means of imposing a lesser limitation on the rights of the group disadvantaged by the classification.

a. Are there effective means of achieving increased program diversity that do not require the use of race/gender classifications? For example, to what extent do market forces independently produce a mix of programming serving the varied needs and interests of broadcast audiences?

b. Should the Commission continue to grant preferences to minorities and women in comparative licensing proceedings, but permit nonminorities and men to overcome such preferences by making a showing that they will make an equal or superior contribution to diversity? Would this affect the constitutionality of the policy? How could such showings be made? Should the tax certificate and distress sale policies be similarly altered?

c. Should the Commission, for example, return to its original position in the *TV 9* case, under which all applicants seeking a diversity preference make individual showings to demonstrate a specific contribution to program diversity? Should

this showing be open to any individual or limited to minorities and women? Should an analogous approach for distress sales and tax certificates be adopted? Is there a way for the Commission to evaluate such individual showings without having to directly analyze program content, for example, by linking any preference to demonstration of past involvement with minority/female issues which may be a more reliable indicator than race or gender *per se*?

d. If race and gender classifications are used in the Commission's ownership policies, how long should they be employed? What monitoring mechanisms should be used? What are the First Amendment ramifications of any such monitoring? If a demonstrable nexus is found, is the comparative process constitutional as presently administered? Distress sales? Tax certificates?

e. Please comment upon the Commission's present practice of granting integrated female owners an enhancement of lesser weight than that granted integrated minority owners in the comparative process. Is there an adequate constitutional basis for these gradations of enhancement? Is there a factual basis for these gradations of enhancement relevant to the Commission's public interest mandate?

Significance of Legislative History of Lottery Statute

18. In enacting the lottery licensing provisions of Section 309(i) of the Communications Act in 1982, Congress explicity incorporated a mandatory minority preference scheme. In connection with that enactment and in other proceedings, Congress has made various statements that relate ownership diversity to diversity of programming and that find a substantial underrepresentation of minorities

and women among owners of mass media. Parties are invited to comment on the referenced Congressional record as a basis, in constitutional terms, for Commission action in continuing to apply the subject ownership policies. We solicit comment on whether the Commission is bound by, or may rely upon, Congressional findings of constitutionality, until directed otherwise by a court, or whether the Commission must independently assess the constitutional issues.

II. EFFECTIVENESS OF CURRENT POLICIES AND ALTERNATIVES

19. In re-evaluating the existing policies, it is necessary to ascertain the extent to which they have been effective. For this purpose, interested parties are asked to address the following questions.

a. To what extent have the subject policies resulted in minority and female ownership? Is there anything in the comparative process that acts as a barrier to the entry of minorities and women into broadcasting? In practice, have integration proposals been carried out? How long have owners benefiting from the policies continued their ownership roles? Has the number of minority and female-owned stations increased, and by how much, since the adoption of each policy? What percentage of stations have been acquired by utilizing these policies?

b. What are the major impediments to increasing minority ownership of the broadcast media? Does financing continue to be substantial problem? To what extent is lack of information on ownership opportunities a problem? What part might the Commission play in eliminating these and other extrinsic problems?

c. What social or other costs might result from continuing these policies? Are these costs out-

weighed by the benefits to be derived from continuing these policies?

20. Commenters are invited to respond to the above questions and to address any other matters raised herein or that the parties deem relevant to a careful reexamination of the subject policies. We encourage parties to submit empirical evidence and hard data wherever possible to support their positions. Where such evidence or data is filed, parties should describe fully the methodology utilized in its compilation and analysis. Parties submitting comments on the constitutional issues presented in the Commission's brief in *Steele* or in this *Notice* are requested to include citations to relevant statutes and case law. Finally, we request that parties identify the question to which they are responding in their comments.

PROCEDURAL MATTERS

21. Authority for this *Notice of Inquiry* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended. Pursuant to applicable provisions set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before May 7, 1987, and reply comments on or before July 6, 1987. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

22. It is our intention at the conclusion of this inquiry proceeding to adopt a final policy statement. Therefore, for purposes of this nonrestricted notice of inquiry proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of inquiry until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules, 47 C.F.R. Section 1.1231. Parties are advised, however, that the specific proceedings involved in the *Steele* and *Shurberg* cases are restricted adjudicatory proceedings and remain subject to the strict *ex parte* provisions of Section 1.1203, *et seq.* of our rules, 47 C.F.R. Section 1.1203, *et seq.*

23. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 5 copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished to the Commission. Members of the general public who wish to participate informally in the proceeding may submit one copy of their comments, specifying the docket number in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 "M" Street, N.W., Washington, D.C. 20554.

24. In view of the fact that we have asked the court to remand the *Steele* case, because of doubts as to the constitutionality of the minority and female enhancement credits, and more particularly, in view of the fact that we are holding that case in abeyance pending completion of this proceeding, we believe it might be arbitrary and capricious to continue to award licenses in other comparative licensing proceedings where the effect of such credits is dispositive. We, therefore, are directing administrative law judges to make findings as to all issues in dispute, including entitlement to a racial/gender preference, and to hold in abeyance all decisions where such credits are dispositive. We see no need, however, to delay action on cases the outcome of which would not be affected by awards of such preferences. Thus, an administrative law judge hearing a comparative licensing case in which a minority/female credit is claimed should make findings and reach conclusions based on application of these credits and, in the alternative, should determine which applicant would prevail if the credits were disallowed. If the credit would not be dispositive, the case should be decided. If, on the other hand, award of the credit would be dispositive, the case should be held in abeyance pending final resolution of this proceeding. The Review Board and Office of General Counsel are also directed to hold in abeyance any cases within their purview where such credits are dispositive.

25. Similarly, because the Commission has requested that the Court of Appeals remand *Shurberg* for reconsideration, and is now holding that application in abeyance pending completion of this docket, the Mass Media Bureau will hold in abeyance all other pending or future applications for distress sales pursuant to the minority ownership policy until such time as a decision in the *Shurberg* proceeding has become final. In the event the Court decides not to grant a remand, applications should be held until the court disposes of the case on the merits; in the event a remand is

granted, applications should be held pending the final resolution of this proceeding.

26. Although the Commission's tax certificate policy raises some of the same questions as the award of race or gender-based credits in comparative licensing proceedings and the grant of distress sale relief, the Commission has not been presented with a specific case challenging that policy and has had no occasion to consider the validity of that policy. Unlike the comparative preference and distress sale cases, no specific tax certificate application is being held in abeyance. Therefore, we are not constrained by the same equitable considerations present in comparative licensing and distress sale cases to hold pending and future tax certificate requests in abeyance. Accordingly, in the event an application for a tax certificate is filed,[9] the Bureau, unless otherwise directed by the Commission, should process the request and grant the tax certificate, if warranted.

27. Accordingly, IT IS ORDERED, That in all comparative licensing cases where a racial, ethnic or gender preference would be awarded in the absence of concerns as to the constitutionality of those preferences, the presiding administrative law judge (after having made findings as to all disputed issues of fact), the Review Board, or the Office of the General Counsel, as the case may be, SHALL DETERMINE whether award of the preference would be dispositive of the outcome of the proceeding and, if so, SHALL DEFER action on such cases pending final resolution of this proceeding.

28. IT IS FURTHER ORDERED, That the Mass Media Bureau SHALL HOLD IN ABEYANCE all applications for preferential treatment under the Commission's distress sale policy pending the earlier of (a) a final judicial determination

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[9] At the moment, there are no pending requests for issuance of tax certificates premised on the sale of licensed facilities to a minority or minority-controlled group.

upholding the validity of the distress sale policy or (b) the final resolution of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

SEPARATE STATEMENT BY COMMISSIONER JAMES H. QUELLO

Re: Inquiry into the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies

Today the Commission launches an inquiry into its comparative licensing, distress sales and tax certificate policies. The primary focus of this inquiry is on the legality of those policies. However, the Commission has also decided that this is an appropriate occasion to assess the success of those policies during the eight years since their adoption. I support these efforts because I believe that both are necessary and proper concerns to the Commission's fulfillment of its public interest obligations.

As I have emphasized before, I remain committed to the Commission's longstanding goal of encouraging and assisting minority and female entry into broadcasting. I have also stated, on other occasions, that I am not inclined to question the wisdom of continuing our minority policies if they are constitutional. To the extent that this Notice of Inquiry contains conclusory statements relating to the legality of our policies, I am not necessarily in accord with those statements and will reserve judgment until I have a record before me. I cannot quarrel, however, with my colleagues' desire to seek comment on whether these policies are indeed accomplishing the worthy objectives that they were designed to achieve. I do, however, place a heavy burden on those that challenge either the constitutionality or the wisdom of our longstanding Commission policy of minority preferences. I intend to study this record very closely before reaching any conclusions on these sensitive issues.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 84-1600

Shurberg Broadcasting of Hartford, Inc.
Appellant,

v.

Astroline Communications Company
Limited Partnership
Intervenor

United States Court of Appeals
For The District of Columbia Circuit

FILED JAN 23 1987

GEORGE A. FISHER
CLERK

BEFORE: WALD, Chief Judge, SILBERMAN, Circuit Judge, and MACKINNON, Sr. Circuit Judge.

ORDER

Upon consideration of the Appellee's motion for remand, and the oppositions of Appellant, Intervenor, and Amici Curiae, it is hereby

ORDERED that the record is remanded for ninety (90) days, without extension, to permit the FCC to resolve its position with respect to the license at issue in this case.

For the Court

/s/ George A. Fisher
George A. Fisher, Clerk

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP

Schedule A

General Partners	Initial Capital Contribution	Additional Capital Contribution	Future Capital Contribution	Percentage Interest
Richard P. Ramirez c/o Astroline Communications Company Limited Partnership 18 Garden Street Hartford, CT 06105	$ 210	$ 0	$ 0	21%
WHCT Management, Inc. 231 John Street Reading, MA 01867	$ 60	$ 0	$ 0	6%
Thomas A. Hart, Jr. 1862 Ingleside Terrace, N.W. Washington, D.C. 20010	$ 10	$ 0	$ 0	1%
Limited Partners				
Astroline Company 231 John Street Reading, MA 01867	$440,616	$7,705,714	$165,714	58%
Martha Rose and Robert Rose as Joint Tenants 18 Morgan Street Wanham, MA 01984	$ 30,042	$ 797,143	$ 17,142	6%
Thelma N. Gibbs 227S South Ocean Blvd. Palm Beach, FL 33480	$ 30,042	$ 797,143	$ 17,142	6%
Terry Planell c/o Astroline Communictions Company Limited Partnership 18 Garden Street Hartford, CT 06105	$ 10	$ 0	$ 0	1%
Danielle Webb c/o Astroline Communications Company Limited Partnership 18 Garden Street Hartford, CT 06105	$ 10	$ 0	$ 0	1%

Oral Argument Was Held In This Case On January 8, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION
Appellee

ASTROLINE COMMUNICATIONS CO.
Intervenor

REPORT AND MOTION FOR FURTHER REMAND
OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE

In an order of January 23, 1987, the Court remanded the record in the captioned case "for ninety (90) days, without extension, to permit the FCC to resolve its position with respect to the license at issue in this case." This pleading constitutes the Commission's response to the Court's order.

Appellant in this case seeks review of a Commission order authorizing a "distress" sale of a television station to a minority controlled buyer. Only certain persons or companies, namely members of certain minority groups and minority-controlled companies, are eligible to buy a station pursuant to the distress sale policy. In a motion filed in this case on October 23, 1986, the Commission sought remand of the record for further consideration in connection with the Court's then recent remand in another case—*Steele v. FCC*, No. 84-1176. The Commission pointed out that the distress sale policy raised many of the same

questions that were presented by the *Steele* case. The Commission stated that because it intended "to undertake a proceeding to ascertain whether there is an adequate justification for the policy of granting comparative preferences based on race and gender, it seems appropriate also to reexamine the justification for the distress sale policy." (Motion at 2).

The above-quoted language reflected the Commission's judgment at the time that it could not arrive at a proper disposition of this case until it had the benefit of its deliberations in the general proceeding to be undertaken in the aftermath of the *Steele* remand. The motion, however, did not specify how long the Commission believed it would take to complete that general proceeding. Upon receipt of the Court's order containing a ninety-day deadline, the Commission, as explained below, revisited its judgment that this case was inextricably linked with the general proceeding. Because the Commission has again concluded that this linkage exists, it is appropriate now to describe the progress of the general proceeding, including an explanation of why it is not possible to complete that proceeding by the time when, according to the Court's January 23d order, the remand in this case is to terminate.

On December 30, 1986 the Commission released a notice of inquiry beginning its general proceeding. *See Notice of Inquiry*, 1 FCC Rcd 1315 (1986). The proceeding is intended to examine the statutory and constitutional validity, and the factual basis for, the Commission's race and gender preference policies used in comparative licensing proceedings, as well as in distress sales and tax certificates. The Commission announced in that notice its intention, pending the adoption of a policy statement at the conclusion of the proceeding, to hold in abeyance all pending comparative licensing proceedings where a race or gender preference could be dispositive and all distress sale applications. *Id.* at 1318-19. Because of the importance of the questions raised in the comprehensive inquiry and because

resolution of these questions, in part, involves significant gathering and analysis of facts, the Commission provided a longer than normal time for the filing of comments. Initial comments are due to be filed on May 6, 1987 and reply comments are due by July 6, 1987. A copy of that Notice was submitted to the Court in this case. *See* Letter of Jan. 2, 1987 from C. Grey Pash, Jr. to George A. Fisher.

Following the Court's January 23, 1987 remand order in this case, the Commission's General Counsel sought from the parties to this case comments on the appropriate response to the Court's order. Specifically, the General Counsel stated that "it would be useful to the Commission to have the parties' views as to how they believe that the Commission can resolve its position 'with respect to the license at issue in this case' without first resolving the general question of the constitutionality of the distress sale policy that is presently under consideration in the inquiry proceeding discussed in note 1 above." *Faith Center, Inc.*, FCC 87I-015 (GC Feb. 11, 1987) at para. 2.

Comments were submitted by Shurberg, Astroline and the Commission's Mass Media Bureau.[1] After carefully reviewing these comments in light of the Commission's original order in this case and its notice of inquiry instituting the proceeding to investigate racial and gender preference policies, the Commission has concluded that it is unable to resolve its position with respect to the license at issue in this case until it has concluded its general inquiry into the validity of race and gender preferences.[2]

[1] An appendix containing copies of the parties' submissions is attached to this report.

[2] The submissions of the parties, although helpful to the Commission, did not provide a basis for the Commission to answer the question that it had posed in the request for comments, i.e., how it could resolve its position with respect to this licensing proceeding prior to resolving the general question of the constitutionality of the distress sale policy. The

An examination of the Commission's order in this proceedings makes clear that the Commission's decision to permit Faith Center to sells its station to Astroline pursuant to the distress sale policy was the major reason for the Commission's refusal to accept Shurberg's competing application. The Commission explained that it was "faced with determining whether the public interest in permitting competing applications to be filed, as articulated in *New South*, outweighs the goals of our minority ownership policies in this case." *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1170 (1984). The Commission concluded that the minority ownership policies should prevail.

The Commission believes that that determination should simply be held in abeyance at this time—neither withdrawn nor reaffirmed by the Commission nor reversed nor affirmed by the Court. Action by the Commission or the Court before the general proceeding on preferences is con-

Commission's Mass Media Bureau took the position that because Shurberg never had a right to file a competing application under existing FCC policy, it was not harmed by the Commission's failure to accept its application and grant of the distress sale application. The Bureau and Astroline both suggested that weight should be given to Astroline's reliance on the existence of the distress sale policy when it filed its application and its expectation that there would be no change in that policy that would vitiate a grant to it, i.e., that would in effect operate retroactively. Shurberg argued that the Commission could avoid the constitutional issue only by confessing error in its conclusion that Shurberg had not been entitled to file a competing application and seeking a remand to undertake the comparative proceeding that Shurberg contends is required. Because of the nature of its order granting the distress sale application here, separating the related policy determinations in which the Commission had balanced the competing public policies at that time in favor of comparative licensing proceedings on the one hand and distress sales to encourage minority ownership on the other is not feasible. In addition, it would be premature to address the reliance/retroactivity questions until the Commission has resolved the general issue of the validity of the distress sale policy since the nature of that decision could be relevant to whether a new policy, if the policy is changed, should be applicable to a situation such as this one.

cluded would, we submit, be premature. Even if the Commission were to eliminate preferences such as the distress sale policy, it has not yet addressed the question of how it would apply such a policy change to situations such as the instant one. Moreover, we would respectfully submit that the Court should not rush to conclude judicial review of an agency decision that is based on a policy about which the agency has subsequently expressed serious reservations and which it is presently re-examining.[3]

We recognize that this case has been pending for some time. However, the harm incurred by the relatively limited further delay awaiting Commission resolution of the general preferences inquiry is not significant and would appear to be evenly divided between the parties. Astroline would have to endure a few more months of uncertainty as to the validity of its grant while Shurberg's efforts to become a participant in a comparative hearing for a construction permit to operate this station would be delayed a bit longer. Neither harm appears so severe as to warrant action at this time.

CONCLUSION

In consideration of the foregoing, we respectfully move the Court for a further remand of the record in this case

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[3] The brief filed by the Commission in this case defended the constitutionality of the distress sales policy. That portion of the brief does not reflect the agency's present view. The Commission's present position on the constitutionality of racial and gender preferences relative to broadcast licensing is reflected in the brief on rehearing *en banc* filed in the *Steele* case and in the *Notice of Inquiry* in the preferences proceeding discussed above, in which the Commission expressed its concern that its comparative preference policies do not at present satisfy constitutional requirements. The Commission has not definitively concluded to what extent the *Steele* brief applies to distress sales, but it has concluded that enough of the same issues are raised that the distress sale policy should be re-examined in the general inquiry proceeding and no distress sales will be granted by the Commission pending completion of that inquiry.

pending final Commission action in its general inquiry into the validity of race and gender preferences. In the alternative, we request that if the Court concludes that it must reach the constitutional issue to decide this case that it hold the case in abeyance itself pending the Commission's conclusion of the general inquiry.

Respectfully submitted,

Diane S. Killory,
General Counsel

Daniel M. Armstrong,
Associate General Counsel

C. Grey Pash, Jr.,
Counsel

Federal Communications Commission
Washington, D. C. 20554
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March 23, 1987

Oral Argument Was Held In This Case On January 8, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

ASTROLINE COMMUNICATIONS CO.,
Intervenor

REPORT IN RESPONSE TO REMAND ORDER

In an order of January 23, 1987, the Court remanded the record in the captioned case "for ninety (90) days, without extension, to permit the FCC to resolve its position with respect to the license at issue in this case." On March 23, 1987, the Commission submitted a "Report and Motion for Further Remand or, in the Alternative, To Hold in Abeyance." By order of April 7, 1987, the Court denied the request for further remand or to hold in abeyance and stated that "[t]he Court's ORDER of January 23, 1987 remains in effect." This report is in response to the January 23rd remand order.

The Commission's preferred course was to have the Court remand this case in a manner that would permit the Commission to withhold action pending completion of its ongoing proceeding exploring the lawfulness of the distress sale and other minority and gender preference policies, or for the Court to hold the case in abeyance itself pending the completion of that proceeding. However, be-

cause the Court's April 7th order essentially directed the Commission to proceed with this case, the Commission submits this response, which represents as definitive a position as is possible pending the completion of the comprehensive proceeding now underway at the Commission.

The Commission's present position on minority and gender preferences relative to broadcast licensing is reflected in the brief on rehearing *en banc* filed in *Steele v. FCC* and in the *Notice of Inquiry*, 1 FCC Rcd 1315 (1986), instituting the proceeding to explore generally the Commission's minority and gender preference policies. The Commission, in those documents, expressed its concern that the minority and gender preference policies that it had employed in comparative licensing proceedings do not at present satisfy constitutional requirements. In the *Notice of Inquiry* the Commission concluded that enough of the same issues were raised with respect to the distress sale policy that it also should be re-examined in the general inquiry proceeding and that no distress sales would be granted by the Commission pending completion of that inquiry.

In reviewing the distress sale petition in this case, the Commission examined only the question whether the proposal made by Faith Center and Astroline met "the basic requirements for a distress sale . . . ." *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1172 (1984). The "basic requirements" included only an examination whether the existing licensee was eligible to transfer the station pursuant to a distress sale, whether the distress sale buyer had the requisite minority ownership and whether the sale price agreed to by the parties met the Commission's requirements. As has been its consistent practice to this point in its implementation of the distress sale policy, the Commission *assumed* that minority ownership would further the public interest. Based on this practice, the Commission automatically has granted distress sale petitions where the buyer was a minority and the other basic requirements were met. Non-

minorities could not take advantage of the distress sale policy to purchase a station, regardless of what showing they might be able to make regarding the public interest benefits of their proposed operation of the station.

Thus, as applied, the distress sale policy has been based on the same sorts of assumptions and presumptions about minority ownership that the Commission has concluded in the *Steele* case lack factual support. To the extent that the distress sale policy also relies on assumptions that minority ownership will result in increased program diversity, the Commission has similar concerns as to the constitutionality of the distress sale policy.[1] The Commission explained in the *Notice of Inquiry* that, although encouraging program diversity is a "compelling governmental interest within the Commission's authority, . . . racial or gender classifications may not be based on the assumption alone that integrated minority/female owners will result in increased content diversity." 1 FCC Rcd at 1317. Thus, the Commission sought in that inquiry "to determine whether there is a nexus between minority/female ownership and viewpoint diversity, and whether such ownership is necessary to achieve that goal." *Ibid.*

While in its application the distress sale policy is constitutionally suspect, it may be possible for the distress sale policy to be implemented in a constitutional manner. When the Commission adopted the distress sale policy for minority owners in 1978, it said that "[t]he parties involved

[1] Indeed it could be argued that the distress sale policy presents more difficult questions than comparative preferences. Unlike comparative proceedings where the minority preference is only one of a number of potential comparative considerations, the minority distress sale policy is available *only* to minorities or minority-controlled applicants. Moreover, the comparative preference is available only where the minority owner will be integrated into the proposed station's daily operations. No such requirement exists in the case of distress sales, and the minority owner thus may have no regular involvement in programming decisions or effect on programming diversity.

in each proposed transaction will be expected to demonstrate to us how the sale would further the goals on which we are today basing the extension of our distress sale policy." *Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 983 (1978). The Commission declined to adopt a formal regulation permitting such transfers, stating that "cases should be reviewed as they arise to determine that the objectives of our policies will be met." *Ibid.* Despite that ruling in 1978, the Commission's subsequent practice has been to assume the policy objectives will be met whenever a minority is the transferee. Whether the Commission should undertake a particularized examination of each distress sale petition and whether such a policy would be both lawful and wise, are questions to be explored in the ongoing general preferences proceeding. In this case, as noted above, the Commission did not engage in that sort of particularized examination of the distress sale petition.

In light of the Court's rejection of the Commission's preferred course of holding this case in abeyance pending resolution of the general inquiry, the agency has given further consideration to the validity and implementation of the distress sale policy in this particular case. Because of the constitutional concerns presented by minority-based government action that relies on unproven assumptions, the Commission has determined that it cannot definitively resolve whether the distress sale policy, as historically applied, is valid as a matter of law or policy, until the ongoing inquiry has been completed.

The instant case, however, does involve unusual circumstances—notably, the lengthy delay which has occurred since 1980 in removing the uncertainty surrounding the license for this station and the Court's decision that this case should proceed without awaiting the completion of the Commission's comprehensive inquiry into minority and gender preferences. The Commission, accordingly, has now determined in the exercise of its discretion that it would

be appropriate to conclude at this time that if the Commission should modify its distress sale policy at the conclusion of its ongoing general inquiry, it would not apply any such new or modified policy to this case. The grant of the distress sale petition here became final, from the Commission's perspective, long before the Commission publicly questioned and sought to reexamine the validity of the distress sale policy, thus leading to justifiable reliance by Astroline on the continuing applicability of the policy.[2]

In consideration of the foregoing, the Commission respectfully urges the Court promptly to affirm the agency's action granting the distress sale application in this case.

Respectfully submitted,

Diane S. Killory,
General Counsel

Daniel M. Armstrong,
Associate General Counsel

C. Grey Pash, Jr.,
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 632-6444

April 23, 1987

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[2] Shurberg has previously noted, and we do not disagree, that Astroline undertook the risk of proceeding with construction and operation of the station pursuant to the Commission's grant while judicial review was still pending in this Court. The Commission believes, however, that in assessing the risk of proceeding pending judicial review, Astroline was entitled to assume that the Commission would support before the Court affirmance of the order granting Astroline's petition.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 84-1600

Shurberg Broadcasting of Hartford, Inc.,
v.
Federal Communications Commission
Astroline Communications Company Limited Partnership,
Intervenor.

United States Court of Appeals
For the District of Columbia Circuit

FILED JUN 25 1987

GEORGE A. FISHER
CLERK

BEFORE: WALD, Chief Judge; SILBERMAN, Circuit Judge, and MacKINNON, Senior Circuit Judge

ORDER

Upon all the records, pleadings, and proceedings herein, it is hereby

ORDERED, by the Court, that the record in this case is remanded for further proceedings.

On remand, the FCC shall take whatever action is appropriate in this case in conformance with its resolution of the issues described in its Notice of Inquiry, MM Docket No. 86-484, 52 Fed. Reg. 596 (1987), provided however, that if the FCC has not made a final determination in the above cited proceeding before the date on which the license at issue in this case would ordinarily be due for renewal,

the FCC shall call for and consider competing applications at the appropriate time, and promptly process such applications according to established FCC procedures. See especially 52 Fed. Reg. at 600. If the FCC should initiate a comparative renewal proceeding concerning this license prior to resolution of the matters on MM Docket No. 86-484, in light of the representations made to this Court at the time appellant sought a stay of the FCC's order, the FCC shall conduct such proceedings without according intervenor Astroline Communications Company Limited Partnership any competitive advantage that would ordinarily accompany incumbency.

Per Curiam
For the Court:
/s/ George A. Fisher
George A. Fisher,
Clerk

Dissenting Statement of Circuit Judge Silberman attached.

Shurberg Broadcasting of Hartford, Inc. v. FCC, No. 84-1600

SILBERMAN, *Dissenting Statement*: I respectfully dissent from the court's order because the FCC's current position, in my view, is indefensible. Last September, the FCC announced in a brief before an en banc panel in *Steele v. FCC*, No. 84-1176, that the Commission had grave doubts about the constitutionality of its policy of granting preferences in comparative hearings to minority and female applicants. In light of the position taken in the *Steele* brief, we asked the Commission whether it continued to stand behind the minority preference embodied in the distress sale policy at issue in this case. In response, the Commission requested that the case be remanded in light of its general reconsideration of racial and gender performances. On January 23, 1987, we remanded the case for 90 days to permit the Commission to determine its position with respect to the license at issue in this case. The Commission has now reported to us that although the distress sale policy is even more constitutionally suspect in its view than comparative preferences, it does not wish to take a firm position as to its legality even as of the date of transfer to Astroline (as compared to any future policy). This kind of courageous fealty to the Constitution seems characteristic of the FCC. *See Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987). In order to avoid taking a position, the Commission asserts that whatever the constitutionality of the policy at the time of the transfer to Astroline, the Commission will permit Astroline to keep the license because Astroline has a legitimate reliance interest. But as the court's order notes, the Commission, in its opposition to appellant's motion for a stay, has already committed itself not to accord any weight to Astroline's investments in the station. The majority thus recognizes that the application of the distress sale policy in this case simply cannot be based on a reliance rationale but disregards the fact that the FCC offers no other justification

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Per Curiam
For the Court:
/s/ George A. Fisher
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Harry Cole, name partner of D.C.'s Bechtel & Cole, representing Shurberg, says he continuing to challenge Astroline.

But Thomas Hart Jr., a partner in the D.C. office of Baker & Hostetler, says the congressional action bolsters the company's case.

Astroline's lobbying team included Hart, who worked in White House Office of Telecommunications under President Jimmy Carter; Richard Hauser, head of the firm's legislative practice and former deputy counsel to President Reagan; and Pamela Garvey, of counsel and former GOP staffer on the Senate Commerce Committee.

While Garvey was not allowed to lobby the Commerce Committee for one year because of Senate ethics rules, she says she helped draft legislation and advise the team about the personalities and procedures of the Senate. Commerce Committee Chairman Ernest Hollings (D-S.C.) was a major supporter of the legislation, according to lobbyists and Senate staffers. The legislation originated in a committee proposal.

On Hauser's recommendation, Astroline also hired Powell Moore, a lobbyist with the government-affairs firm Ginn, Edington, Moore & Wade and a former assistant secretary of state and White House deputy assistant for legislative affairs. Moore worked the Senate Republicans.

Working the Democrats was Joan Dawson, a solo lobbyist who once worked for Sen. Sam Nunn (D-Ga). She helped with drafting and lining up supporters.

Bruce Fein, an outspoken conservative and former FCC general counsel, was of counsel for Astroline in court.

Hart says support also came from the National Association of Broadcasters and the National Association of Black Owned Broadcasters.

In addition, Daniel Popeo, chairman of the Washington Legal Foundation, a pro-business public-interest law group,

came out on Astroline's side against what he saw as arbitrary government action. According to the Washington Legal Foundation's Michael McDonald, the foundation doesn't lobby, but he says, "Our interests intersected in that one case."

"It caught the imagination of the conservatives and liberals," Dawson says.

Key Senate supporters also included Lowell Weicker Jr. (R-Conn.) and Frank Lautenberg (D-N.J.) Weicker was concerned about the quality of broadcasting in Connecticut and pushed to get the measure included. A Lautenberg aide said Weicker sought the New Jersey senator's help because he was a Democrat on the Senate Appropriations subcommittee that oversees FCC funding. "It was civil rights and a good-policy issue," the Lautenberg aide says. Hollings was subcommittee chairman.

A GOP Commerce Committee staffer says that inclusion of the FCC rules in the budget bill was different from the controversial legislation slipped by Sens. Hollings and Edward Kennedy (D-Mass.) that bars the FCC from continuing cross-ownership waivers for Murdoch. The minority-preference rules surfaced first in separate legislation in September, giving any opponents the chance to fight, the staffer says. (*See "Limiting Speech in the Name of Freedom," Page 19.*)

Cole, a former FCC staffer, says he told senators last fall to say it was inappropriate for Congress to get involved in the middle of FCC and court proceedings, but he didn't "buttonhole" them.

"We're a small law firm. We're not Baker & Hostetler," Cole says of his four-lawyer firm.

ORAL ARGUMENT HELD JANUARY 8, 1986

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

ASTROLINE COMMUNICATIONS CO.,
Intervenor

FCC RESPONSE TO MOTION FOR EXPEDITED RESOLUTION ON THE MERITS

Appellee Federal Communications Commission hereby submits its response to the "Motion for Expedited Resolution on the Merits" filed by appellant Shurberg Broadcasting.

The Commission earlier represented to the Court that it did not believe that it was appropriate for the Court to proceed with this case while the Commission was reexamining in a general inquiry proceeding the bases for, and validity of, the Commission's minority and female preference policies. That inquiry included an examination of the distress sale policy that underlies this case. The Court remanded the record to the Commission to permit it to take whatever action is appropriate in conformance with the Commission's resolution of issues in the reexamination proceeding. Order of June 25, 1987.

As Shurberg correctly notes in its pleading, the Commission did recently terminate its inquiry prior to its completion. *See Racial, Ethnic & Gender Classifications, MM Docket No. 86-484*, FCC 88-17 (Jan. 14, 1988). That action was taken in compliance with the Continuing Resolution for Fiscal Year 1988, H.J. Res. 395, Pub. L. No. 100-202, 101 Stat. 1329 (1987), which provides, in relevant part:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended, 52 R.R.2d 1313 (1982) and Mid-Florida Television Corp., 60 F.C.C.2d 607 Rev. Bd. (1978), which were effective prior to September 12, 1986, *other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications or proceedings, which were suspended pending the conclusion of the inquiry* . . . .

(emphasis added)

Because the Commission's reexamination proceeding now has been terminated, the basis for our previous position that the Court should not proceed with this case pending resolution of that proceeding no longer is valid. Thus, the Commission agrees with Shurberg's motion to the extent that it argues that further delay in judicial resolution of this case would not be warranted.

We wish, however, to clarify two points on which we take exception to Shurberg's characterization of the facts.

First, Shurberg is inaccurate in asserting that the Commission "appears to have conceded" that the distress sale policy is unconstitutional. Motion at 4. The Commission has made no such concession. The Commission stated in pleadings in this case that it had serious questions about the validity of its comparative licensing preference policy on a variety of grounds, including constitutional grounds, and that many of the same questions were relevant to the distress sale policy. The Commission also stated that it could not finally resolve those questions until it had completed the inquiry into these policies that has now been terminated. However, the Commission has never announced any conclusion that the distress sale policy is unconstitutional.

Second, we reject Shurberg's contention that the parties and the Court are in precisely the position they were in when the FCC first requested a remand in this case. Motion at 2 & n.1. On the contrary, although the Commission has terminated the reexamination proceeding, it also has adopted and released an order reaffirming its previous action with respect to the license that is at issue in this case. *In re Applications of Faith Center, Inc.*, FCC 88-47 (released February 23, 1988) (Attachment A to this response).[1] That order, like the order terminating the reexamination proceeding, was adopted in order to comply with the legislation. The enactment of the Continuing Resolution, the termination of the Commission's reexamination proceeding, and the Commission's adoption of the order reaffirming its earlier action in this case all are matters that have occurred since the remand. It is thus not accurate to state that the parties and the Court are in "precisely the same place" they were in before the Commission first requested remand.

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[1] The Commission simultaneously released similar orders reaffirming its earlier decisions in two other cases involving issues of racial or gender preference. Copies of those decisions are Attachments B and C to this response.

Respectfully submitted,

Diane S. Killory,
General Counsel

Daniel M. Armstrong,
Associate General Counsel

C. Grey Pash, Jr.,
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Federal Communications Commission
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February 24, 1988

Before the
Federal Communications Commission
Washington, D.C. 20554

BC DOCKET NO. 80-730
File No. BRCT-348

In re Applications of

FAITH CENTER, INC.
Hartford, Connecticut

For Renewal of License

ORDER

Adopted: February 9, 1988;
Released: February 23, 1988

By the Commission:

1. This proceeding involves the application of Faith Center, Inc. for renewal of its license for the television station operating on UHF channel 18 at Hartford, Connecticut. By Memorandum Opinion and Order, 99 FCC 2d 1164 (1984), the Commission granted the request of Faith Center to assign the license for this television station to Astroline Communications Company Limited Partnership, pursuant to the Commission's distress sale policy announced in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978), revised, 92 FCC 2d 849 (1982). The Commission also denied the request of Shurberg Broadcasting of Hartford, Inc. to designate its application for a comparative renewal hearing together with Faith Center's renewal application to determine which applicant should operate a television station on Channel 18.

2. Shurberg filed an appeal of the Commission's decision with the United States Court of Appeals for the District of Columbia Circuit. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir. Dec. 10, 1984). One issue raised on appeal by Shurberg was whether the Commission's distress sale policy is constitutional.

3. Thereafter, in a separate matter in 1985, a divided three-judge panel of the Court of Appeals held that the Commission's policy awarding a gender preference in comparative licensing proceedings was invalid because it exceeded the Commission's statutory authority. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). The Court *en banc* vacated the panel opinion and ordered rehearing. Order, No. 84-1176 (D.C. Cir. Oct. 31, 1985). Subsequently, the court granted the Commission's motion to remand the case in order to permit the agency to reexamine the bases for its minority and female preference policies. Order, No. 84-1176 (D.C. Cir. Oct. 9, 1986). On remand, the Commission initiated a notice of inquiry proceeding to consider these questions. *See Race and Gender Preferences*, 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484), modified, 2 FCC Rcd 2377 (1987). In that notice, the Commission stated that it would hold in abeyance, pending the conclusion of its inquiry, all cases in which a racial, ethnic or gender preference could be dispositive.

4. Following the remand of the *Steele* case, the *Shurberg* panel asked the Commission to submit a brief setting forth its position on the constitutionality of the distress sale policy. In light of the then planned inquiry on comparative preferences and the fact that many of the same issues were presented by the distress sale policy, the Commission sought a remand of the record in the instant proceeding to consider the justification for the distress sale policy in MM Docket No. 86- 484. On June 25, 1987, the Court remanded this proceeding to the Commission.

5. On December 22, 1987, the President signed into law House Joint Resolution 395 which contained the appropriations legislation for the Commission for fiscal year 1988.[1] This legislation appropriated money for Commission salaries and expenses with the following pertinent proviso:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, *as amended*, 52 R.R.2d 1313 (1982) [sic][2] and *Mid -Florida Television Corp.*, 60 F.C.C. 2d 607 Rev. Bd. (1978) [sic],[3] which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

6. In compliance with this legislation, the Commission has ordered MM Docket No. 86-484 closed, thereby terminating the reexamination of its licensing policies based on racial, ethnic or gender preferences. *Order*, FCC 88-17, adopted January 14, 1988. In order to comply with the legislation fully, the Commission also ordered that its licensing policies based on racial, ethnic or gender pref-

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[1] *Making Further Continuing Appropriations* for Fiscal Year 1988 and for Other Purposes, Pub. L. No. 100-202 (signed Dec. 22, 1978).

[2] 52 RR 2d 1301 (1982).

[3] 69 FCC 2d 607 (Rev. Bd. 1978).

erences that were in effect prior to September 12, 1986, be reinstated and that the presiding Administrative Law Judges, the Review Board, and the Office of the General Counsel process all licensing cases in a manner consistent with Commission policy in effect prior to September 12, 1986. *Id.*

7. ACCORDINGLY, IT IS ORDERED, That in view of the termination of MM Docket No. 86-484 and the Commission's reinstatement of its distress sale policy, the instant proceeding IS REACTIVATED and the Commission's ruling, 99 FCC 2d 1164 (1984), granting Faith Center's request to assign Channel 18 to Astroline IS REAFFIRMED, in compliance with the legislative directive set forth in House Joint Resolution 395, Pub. L. No. 100-202.

FEDERAL COMMUNICATIONS COMMMISSION

H. Walker Feaster, III
Acting Secretary

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1600

SHURBERG BROADCASTING OF HARTFORD, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

ASTROLINE COMMUNICATIONS CO.,
Intervenor

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appellee Federal Communications Commission respectfully petitions for rehearing of the decision of March 31, 1989 in the captioned case and suggests the appropriateness of rehearing by the Court *en banc*. This case involves a challenge to the FCC's longstanding "distress sale" policy, whereby applicants controlled by members of certain specified minority groups are permitted, in limited circumstances, to purchase a broadcast station from an existing licensee whose license has been designated for a renewal or revocation hearing. Since 1987 the policy has been mandated by statute.

In the decision, a panel of the Court, with Chief Judge Wald dissenting, found the distress sale policy unconstitutional. The two judges in the majority, although writing separately, agreed that the policy failed the narrowly tailored test because the policy, which makes race determinative in defining the class of eligible buyers, imposed an

undue burden on nonminorities.[1] The FCC believes that the majority erred in holding the distress sale policy unconstitutional.

CONCISE STATEMENT OF THE ISSUE AND ITS IMPORTANCE

This case presents for the first time the important issue whether a race conscious policy mandated by Congress can pass the narrowly tailored test when race is the only factor in determining who is eligible to participate in a program designed to promote diversity of viewpoint.[2] This specific issue is one aspect of the broader question concerning the degree to which the government can lawfully burden nonminorities when it adopts a race conscious policy in pursuit of diversity.[3] The issue is of particular importance here

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[1] Judges Silberman and MacKinnon also agreed that the policy was not narrowly tailored to remedy past discrimination because the benefits under the program are not tied to the effects of past discrimination, and the program is thus not reasonably related to the governmental interest in remedying discrimination. As Chief Judge Wald notes (Wald opin. at 42), however, Congress in 1987 mandated the continuation of the policy as a means of promoting programming diversity and did not rely on the rationale of remedying past discrimination. Similarly, the Commission's brief justified the policy on the basis of the diversity rationale. And another panel of this Court has recently reaffirmed the continuing validity of the diversity goal. *See Winter Park Communications, Inc. v. FCC*, No. 85-1755 (D.C.Cir. April 21, 1989), slip opin. at 14. In this petition, we therefore focus on only those aspects of the holding of the panel majority that address the diversity rationale.

[2] The distress sale policy has been in existence since 1978 and has resulted in the Commission's approval of 38 distress sales to minority buyers. No one until now has challenged the constitutionality of the policy.

[3] This Court has addressed, and upheld on both statutory and constitutional grounds, the FCC's use of a race conscious policy in broadcast licensing where race is one of many factors the FCC considers in comparing applicants for a license. *See Winter Park Communications, Inc. v. FCC*, No. 85-1755 (D.C.Cir. April 21, 1989); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*,

because this policy reflects a considered Congressional judgment.

In finding the distress sale policy unconstitutional, the majority did not defer to Congress' judgment that promoting broadcast diversity required limiting the use of the distress sale policy to minority buyers in the small numbers of situations each year where the FCC orders a hearing on a broadcast licensee's basic qualifications. This holding conflicts with *Fullilove v. Klutznick*, 448 U.S. 448 (1980) where the Supreme Court upheld, in the remedial context, a Congressional determination to allocate a small portion of construction contracts exclusively on the basis of race. Contrary to the conclusions of the panel majority, the burden that the distress sale policy imposes on nonminorities meets tests established in *Fullilove* and other Supreme Court opinions regarding programs designed to remedy past discrimination. A burden analysis should be no different when the program is designed to promote diversity.

The constitutional validity of the FCC's use of race conscious policies—particularly where, as here, the policy is mandated by Congressional legislation—is a matter of sufficient importance to warrant consideration by the Court *en banc*. The need for resolution of this question by the full Court is heightened here because this decision threatens other established race conscious policies that are man-

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470 U.S. 1027 (1985); *TV 9, Inc. v. FCC*, 495 F.2d 929, 935-38 (D.C.Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). The Court has held that diversity in broadcast programming—the FCC's stated goal in adopting race conscious policies—is a sufficiently compelling government interest to warrant the use of such programs (*see West Michigan*, 735 F.2d at 614), and that a race conscious program concerned with the licensing of broadcast stations is reasonably related to the goal of promoting programming diversity because Congress has found that there is a link between minority ownership and programming diversity. *See* MacKinnon opin. at 12-14; Wald opin. at 23-31. *See also West Michigan*, 735 F.2d at 610. Judge Silberman does not agree on this point. *See* Silberman opin. at 39-45.

dated by Congress and because of this Court's exclusive jurisdiction to review FCC licensing actions. *See* 47 U.S.C. § 402(b).

BACKGROUND

1. Minority Preference Policies

The FCC has sought for many years to maximize diversity of ownership of broadcast stations in furtherance of the ultimate goal of maximizing the diversity of programming and viewpoint available to the public.[4] The Commission crystallized those goals in its *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), which accorded major significance to promoting diversity of broadcast expression through diversity of broadcast ownership. The Supreme Court subsequently held that "the 'public interest' standard [of the Communications Act] necessarily invites reference to First Amendment principles, . . . and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.' "[5]

In 1973 this Court instructed the Commission that the public interest in diversity of viewpoint should be implemented by increasing minority involvement in broadcast media ownership. *TV 9*, 495 F.2d at 937; *see West Mich-*

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[4] *See, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677 (D.C.Cir.), *cert. denied*, 342 U.S. 830 (1951).

[5] *FCC v. NCCB*, 436 U.S. 775, 795 (1978), *quoting Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945). *See also Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C.Cir. 1971).

igan, 735 F.2d at 610.[6] In response to *TV 9*'s directives, the Commission concluded that minority ownership and participation should be treated as an enhancement to the standard comparative criterion of integration of ownership and management,[7] an element used in the comparative licensing process to evaluate which competing applicant is likely to provide the best practicable service to the public. *See WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978). In 1978, concluding that the dearth of minority broadcast owners continued to be an obstacle to the public interest goal of diverse programming, the Commission adopted the minority distress sale policy as an alternative to the lengthy and costly comparative hearing process. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 983 (1978).[8]

In 1982 Congress endorsed the FCC's minority ownership policies when it amended the Communications Act to require the Commission to provide minority ownership preferences in the newly authorized lottery process. Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (Sept. 13, 1982), *codified at*, 47 U.S.C. § 309(i)(3). *See* H.R.Conf. Rept. No.

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[6] The FCC's race conscious policies are based on the FCC's conclusion that the broadcast audience, regardless of its racial composition, will benefit from exposure to programming that has a minority perspective. This basis for the policies should not be confused with the separate question of providing programming that is targeted to appeal to an audience composed of minorities. *See, e.g.*, Wald opin. at 17.

[7] *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395-96 (1965).

[8] Under this policy, the Commission permits a licensee whose basic qualifications have been designated for a hearing to transfer or assign its license to a qualified minority applicant at a distress sale price. The Commission has defined a distress sale price as being no more than 75% of the fair market value of the property. *See Lee Broadcasting Corp.*, 76 F.C.C.2d 462 (1980). The distress sale policy is applicable, however, only where no other party has filed a timely competing application. *See Clarification of the Distress Sale Policy*, 44 Radio Reg.2d (P&F) 479, 480 n.3 (1978).

765, 97th Cong., 2d Sess. 40-43 (1982)(citing with approval the FCC's 1978 *Minority Ownership Policy Statement*). More recently, in 1987 and 1988, Congress reaffirmed its support for such policies when it adopted, as part of appropriations legislation governing the FCC, a prohibition on the repeal or reconsideration of the distress sale policy and other minority preferences. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); H.R.Conf. Rept. No. 498, 100th Cong., 1st Sess. 504 (1987); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988).

In 1984, this Court upheld the comparative credit for minorities and noted favorably the existence of other FCC race conscious policies such as the distress sale program. *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601. And as recently as last month, the Court concluded that "the constitutional foundation for *West Michigan* remains intact." *Winter Park Communications, Inc.*, slip opin. at 14. Thus with the prodding, endorsement and encouragement of both this Court and the Congress, the Commission has for more than a decade interpreted the public policy favoring diversification to encompass advancing minority ownership as a means of enhancing diversity of viewpoints in broadcasting.

2. The Faith Center Distress Sale

Faith Center's license renewal application for WHCT-TV in Hartford, Connecticut was designated for hearing on basic qualification issues in 1980. There were no parties seeking to file a competing application for the license at that time.[9] Faith Center subsequently proposed to transfer the license to intervenor Astroline pursuant to the distress sale policy.

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[9] It was not until 1983 that appellant Shurberg attempted to file an application competing with Faith Center, in violation of FCC rules that preclude acceptance of competing applications once a renewal application has been designated for hearing.

The Commission granted the distress sale transfer to Astroline and dismissed Shurberg's attempt to file a competing application. *See Faith Center, Inc.*, FCC 84-613 (Dec. 7, 1984) J.A. 1. In view of all of the administrative, judicial and legislative findings noted above, the Commission rejected Shurberg's argument that the distress sale policy was unconstitutional. Shurberg appealed.

3. The Panel Opinion In This Case

The panel remanded the proceeding to the Commission, finding that the distress sale policy is unconstitutional because it "is not narrowly tailored to remedy past discrimination or to promote programming diversity." *Shurberg v. FCC, per curiam* opinion at 2. Although the judges in the majority accompanied the short *per curiam* opinion of the Court with 67 pages of separate opinions, they agreed only that the distress sale policy is unconstitutional because it "unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interests it seeks to vindicate." *Ibid.*

Chief Judge Wald dissented from the judgment and opinions of the majority of the panel, stating that "[i]n casting off a thoughtfully conceived and monitored program aimed at attaining a legitimate congressionally mandated end, the majority has too rigidly applied Supreme Court affirmative action guidelines designed for other types of programs, ignored firm precedents in this circuit, and failed to credit the explicit intent of Congress." Wald opin. at 1.

WHY REHEARING SHOULD BE GRANTED

The majority's holding in this case strikes down a Congressionally mandated policy. In its failure to give appropriate deference to Congressional determinations and in its conclusion that the distress sale policy unduly burdens nonminorities, the majority's holding conflicts with *Fullilove v. Klutznick*, 448 U.S. 448 (1980). And even the

majority of this sharply divided panel found only a paragraph's worth of reasoning on which they could agree. For these reasons, this case warrants the attention of the Court *en banc*.

The majority opinion appears to conclude that when the diversity rationale is the basis for a race conscious government policy, the "narrowly tailored" requirement established in Supreme Court opinions cannot be satisfied when race is the determinative factor for enjoying certain broadcast licensing opportunities. The Supreme Court in *Fullilove*, however, sustained a policy under which a benefit could be awarded solely on the basis of race.[10]

While *Fullilove*, of course, involved a race conscious policy in a remedial context and the present case arises in the diversity context, this difference does not change the effects of a race conscious policy. In other words, from the perspective of a nonminority who loses out under a race conscious program, it matters not whether the purpose of the program was to remedy past discrimination or to promote diversity. *See* MacKinnon opin. at n.9.

In *Fullilove* the Court also found that Congressional judgments establishing a race conscious policy deserve considerable deference. 448 U.S. at 472-73, 520 n.4. Specifically, Chief Justice Burger stated that although Congress had recited no "findings" in the statute at issue, "we are satisfied that Congress had abundant historical basis from

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[10] In the pre-*Fullilove* decision in *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), four justices would have upheld the constitutionality of a minority set-aside and Justice Powell would not. Recently, in *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), the Court refused to uphold a set-aside, but was careful not to overturn the earlier approval in *Fullilove* of a Congressionally mandated set-aside. The distress sale program, like *Fullilove*, but unlike *Bakke* and *Croson*, involves a situation where Congress ordered an allocation of certain benefits exclusively on the basis of race. The Court in *Croson* emphasized the significance of a Congressional imprimatur on a race conscious program in discussing *Fullilove*.

which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.* at 478. In this case, Congress did make "findings."[11] And Congress had at least as abundant a basis for codifying the distress sale policy as it had for enacting the law upheld in *Fullilove*.[12]

In this case, two judges agreed that it is appropriate to afford a high degree of deference to a Congressional judgment even when the race conscious policy is based on the diversity objective rather than the objective of remedying past discrimination. Those judges thus deferred to the Congressional judgment that a link exists between minority ownership and programming diversity. *See* MacKinnon opin. at 12-14; Wald opin. at 25-26.

However, only Chief Judge Wald was prepared to afford a similar degree of deference to the Congressional judgment that the distress sale policy should be included among the methods for accomplishing the diversity objective. Judge MacKinnon did not defer to Congress on this judgment. No basis in law exists for giving deference in one instance, but not the other. Both judgments—*i.e.*, that a link exists between minority ownership and programming diversity and that the distress sale policy is an appropriate

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[11] *See, e.g.*, S.Rep. 182, 100th Cong., 1st Sess. 76 (1987). The presence of specific Congressional judgments in *Fullilove* and in the present case serve in large part to distinguish these cases from the situations before the Supreme Court in *Croson* and *Wygant*, neither of which involved a Congressionally mandated program. *See* note 10 above.

[12] Congress held hearings prior to adoption of the 1987 legislation. *See Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. (1987). In addition, Congress was aware of the years of FCC and legislative consideration of this matter. A comparison of this substantial body of material with the evidence before Congress cited by the Court in *Fullilove* (448 U.S. at 458-67) demonstrates that Congress had at least as much specific factual evidence before it here as it did in *Fullilove*.

means for achieving the diversity objective—are relevant to the "narrowly tailored" analysis. Indeed, a case could be made for affording more deference to the decision to select a program in which race is the only factor because, as Chief Justice Burger's opinion in *Fullilove* declared, "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." 448 U.S. at 480 (citation omitted).[13]

We do not contend that a race conscious program in which a benefit is awarded exclusively on the basis of race could never be found to place an unlawfully heavy burden on nonminorities. The distress sale program, however, does not place an undue burden on nonminorities, either in the individual circumstances of this case or, more generally, from the perspective of all nonminorities interested in entering the broadcast industry. The panel majority erred when it concluded otherwise.

For example, Shurberg (or any other nonminority) has three options for acquiring a broadcast station—it can apply for a new station, buy an existing station, or file a competing application against a renewal application. The distress sale policy has no effect on applications for new stations or timely filed applications competing against renewals. Nor does the policy directly implicate all assign-

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[13] In addition, Chief Justice Burger noted in *Fullilove* that the set-aside there in issue was "appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or reenactment." 448 U.S. at 489 (footnote omitted). The same can be said of the distress sale program ordered by Congress. When Congress first ordered the FCC to retain the program in 1987, it did so for one fiscal year. The following year, Congress ordered the program to continue but again this was done for Fiscal Year 1989 only. Thereafter, Congress could extend or eliminate the program, or leave its fate to the discretion of the Commission.

ments and transfers—*i.e.*, sales—of existing stations.[14] In addition, distress sales represent only a tiny fraction of all assignment and transfer applications. From fiscal years 1979 through 1987, only 38 distress sales were approved by the FCC.[15] Over the same period, the FCC approved approximately 9,000 sales of broadcast stations.[16] Thus, during its existence, the minority distress sale policy has accounted for four tenths of one percent of all broadcast station sales; or, from the other perspective, 99.6% of all broadcast station sales did *not* involve the minority distress sale policy. Similarly, during the same period, roughly 20,000 license renewal applications were filed, but only 94, or 0.5% were designated for hearing and thus even eligible for disposition pursuant to the distress sale policy.[17] In sum, the distress sale policy operates to foreclose to nonminorities only a relative handful of the opportunities to acquire a broadcast station.

Even in those relatively few cases where a distress sale becomes a possibility because an incumbent licensee finds itself in difficuty before the Commission, nonminorities are not necessarily foreclosed from having the opportunity to acquire the station at issue. If a nonminority (or a minority for that matter) files a competing application before the incumbent's renewal application is designated for hearing,

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[14] As noted, the policy is only available to facilitate the sale of broadcast stations whose applications already have been designated for hearing and are not subject to a competing application.

[15] *See* MacKinnon at 9, citing *Distress Sales Approved*, FCC Consumer Assistance & Small Business Div. (Oct. 18, 1988).

[16] The Commission actually approved 18,482 assignments or transfers during this period. *See* Broadcast/Mass Media Application Statistics, Annual Reports of the Federal Communications Commission FY 1979—FY 1987. Agency staff familiar with this area estimate that corporate reorganizations and similar technical changes represent at least one-half of the applications granted.

[17] *See* Broadcast/Mass Media Application Statistics, Annual Reports of the Federal Communications Commission FY 1979—FY 1987.

the distress sale option is not available. *See* note 7 above. Thus, a nonminority can prevent the distress sale policy from ever coming into play. For example, had Shurberg filed its competing application before the Commission designated Faith Center's renewal application for hearing, there would have been no distress sale. We note that timely filed competing applications against two of Faith Center's other stations did, in fact, prevent their sale under the distress sale policy. *See Faith Center, Inc.*, 89 FCC 2d 1054 (1982) and 90 FCC 2d 519 (1982).[18]

A comparison of the foregoing statistics with similar information considered in *Fullilove* further demonstrates that the impact of the distress sale policy on nonminorities is not so great as to make the policy unconstitutional. Chief Justice Burger concluded in *Fullilove* that the burden on nonminority firms was "relatively light" because the percentage of funds available to minorities alone was a minuscule percentage (0.25%) of the amount spent on construction in the United States. 448 U.S. at 484-85 n.72. The same is true with the distress sale program. Although Congress did not limit the number of broadcast stations that could be transferred under the distress sale program, Congress could reasonably know from the Commission's experience that there have been, on average, fewer than 5 distress sales per year—approximately 0.20% of renewal applications filed each year.

Even where an opportunity for a distress sale does materialize, it does not, contrary to Judge MacKinnon's conclusion, "operate[ ] more like a firing plan. . . ." MacKinnon

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[18] Even when the distress sale option is exercised, nonminorities can seek to become a limited partners in a minority controlled entity and share in whatever financial benefits arise from operating a broadcast station on that frequency. *See Policy Statement*, 9 F.C.C.2d 849 (1982). Indeed in this case, the minority general partner held only a 21 per cent ownership interest in Astroline Communications Co. *See* Silberman opin. at 8.

opin. at 16. Instead, as Judge Wald correctly observed, "the distress sale policy involves entry into a market [and] is far more analogous to 'hirings' than to 'firings.' . . . Because of the unique and unpredictable nature of such situations, a distress sale can hardly be said to disrupt the settled expectations of potential licensees." Wald opin. at 38.[19] Moreover, as Chief Justice Burger stated in *Fullilove*, "[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." 448 U.S. at 484, *quoting Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976).[20]

The panel majority, however, has adopted such a low threshold of burden on nonminorities in construing the narrowly tailored standard as to invalidate almost any race conscious programs that a federal agency or Congress could devise. Or, as Judge Wald observed, "My colleagues' approach suggests—erroneously in my view—that affirmative action is permissible only when nothing very much is at stake, when such a superabundance of opportunity exists that no one need go without." Wald opin. at 40 n.47. The panel majority's view is in error and in conflict with Supreme Court opinions. The majority's error is a serious matter that warrants the attention of the Court *en banc*.

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[19] Recent events, in fact, indicate that what Shurberg lost was not the right to acquire this station, but to participate in a comparative hearing with at least four other parties who also desire the station. That is the number of competing applications that were filed recently when this license came up for renewal. Action on those applications has been deferred pending the outcome of this litigation.

[20] *See also Wygant*, 476 U.S. at 280-81 (opinion of Powell, J.)("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."); Wald opin. at 36-37.

CONCLUSION

In consideration of the foregoing, the Court should grant rehearing *en banc* in this case.

Respectfully submitted,

Diane S. Killory
General Counsel

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May 15, 1989

Letter to Constance L. Duprè, Clerk, from Daniel M. Armstrong, Associate General Counsel, May 22, 1989, and attachment

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

May 22, 1989

IN REPLY REFER TO:

Constance L. Duprè, Clerk
United States Court of Appeals for
the District of Columbia Circuit
Washington, D. C. 20001

Re: *Shurberg Broadcasting v. FCC*,
D.C.Cir. No. 84-1600

Dear Ms. Durpè:

Footnote 12 on page nine of the petition for rehearing recently filed by the Commission in the referenced case refers specifically to certain 1987 Congressional hearings. At the request of the Court, I have enclosed 20 copies of the pertinent pages of those hearings. These pages may be found at: *Hearings on H.R. 2763 before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. Part 1 at 17-19, 75-77 (1987). Footnote 12 also alluded to earlier legislative consideration of race conscious communications policies. This was a reference to: *Minority-Owned Broadcast Stations—Hearings on H.R. 5373 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media—Hearings before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media—Hearings on H.R. 1155 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess.

(1983); H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. (1982).

Sincerely,

/s/ Daniel M. Armstrong
Daniel M. Armstrong
Associate General Counsel

enclosure

cc: all counsel

Senate Hearings
Before the Committee of Appropriations

Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations

***Fiscal Year* 1988**

100th CONGRESS, FIRST SESSION

H.R. 2763

PART 1 (Pages 1-1087)

ARMS CONTROL AND DISARMAMENT AGENCY
DEPARTMENT OF COMMERCE
DEPARTMENT OF STATE
FEDERAL COMMUNICATIONS COMMISSION
FEDERAL MARITIME COMMISSION
INTERNATIONAL TRADE COMMISSION
MARINE MAMMAL COMMISSION
MARITIME ADMINISTRATION
OFFICE OF U.S. TRADE REPRESENTATIVE
UNITED STATES INFORMATION AGENCY

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done specifically vis-a-vis Channel 18. But I think it has been quite a period of time that has passed since Astroline Communications took that station over. It seems to me something is owed. I don't care what the decisions are. That is not my business. That is your business. In terms of times consumed, that is my business as far as constituents are concerned, and I appreciate your paying attention to that.

Mr. FOWLER. Senator, I appreciate your position. I will go back and see if we can move that proceeding along or to make sure we can do that.

AUCTIONS

Senator WEICKER. Lastly, I was listening to the dialogue between you and Senator Rudman. I don't know what the resolution to that is. I would be anxious to hear what Senator Rudman's idea is. The lottery idea was awful.

It seems to me that the auction concept as raised by the Chairman does have merit in trying to take care of the various deficiencies existent in the other two systems.

If there is a fourth idea, I would like to find out about it.

Senator RUDMAN. You will. [Laughter.]

Senator WEICKER. All I am saying is, I don't think the chairman is off the wall in what he is suggesting. I think what he is trying to suggest are some proven deficiencies in the other systems that have been used. To that extent, I am glad somebody else is thinking about something new in that regard.

Senator HOLLINGS. Senator Lautenberg?

Senator LAUTENBERG. I appreciate it, Mr. Chairman, and I appreciate the willingness of my colleagues to give me an opportunity to get in and get out.

Mr. Fowler, since the airwaves are so scarce, you and the Commission have a responsibility to make sure that they are used to reflect the diversity of views and the diversity of background and interests in our country.

One way is to promote the diversity of ownership, and that is to make radio and TV stations available to qualified blacks and other minorities, as well as others.

A mere 2 percent of the broadcast stations are owned by minorities, but I can tell you that those stations serve a very important need to express a particular viewpoint and to serve those special needs. The Commission has had policies in place to give minorities and women an edge. In 1982, the Congress agreed; it required the FCC to award preferences to minorities when it issued broadcast licensing by lotteries, and, of course, we agreed.

The court in the TV 9 case and the West Michigan case approved minority preferences. Now the FCC is conducting an inquiry. It wants to know if a minority preference is needed to promote diverse programming, but the Congress has said that apparently that is not good enough.

Apparently, you don't like what the Congress has said or if you disagree, paragraph 18 of your notice says, "We solicit comment on whether the Commission is bound by congressional findings of constitutionality."

Does that mean that the FCC puts itself in a position above the Congress, above the courts, to declare laws unconstitutional and to refuse to enforce them? It is a dilemma for us.

Mr. FOWLER. No, no, Senator, it doesn't mean that at all. It means the proverbial rock and the hard place, we

need to look at the gender and race preferences on both public policy ground and Constitutional grounds.

We have a number of cases that have come up in the Supreme Court dealing with gender and race as preferences that we have to also think about, too. On the other hand, we have Congress having said, for example, in the 1982 law which you referred to that we shall provide preferences when we use the lottery to issue licenses for low power television stations.

So that is the question, exactly. We are trying to find out what our duties are under the law, and we are getting advice from two very important bodies.

Senator LAUTENBERG. Don't you believe that you ought to take the mandate as given to you by Congress at this point while the other issues are being considered by the Judiciary?

Mr. FOWLER. Well, we haven't in any way changed our policy in the meantime.

Senator LAUTENBERG. What is being done?

Mr. FOWLER. Problems are still applied in adjudicatory cases. All we have said is if the judge decides a particular applicant wins, we want to hold those cases in abeyance pending what happens with this court case.

Actually, we have two of them that have raised the question of (*a*) whether or not race and gender-based preferences are Constitutional; and (*b*) whether or not they are good public policy.

One of the things I proposed—by the way, Senator, having dealt with minorities myself and as a practicing attorney and having represented a good number of them where I have to essentially float them, if you will, because they didn't have money in many of these competitive hearings—I proposed that we take some of the money from the spectrum auctions Senator Rudman has hesitancy about

and use that as a revolving fund to provide, in effect, financing for people who are below a certain income level. I believe this would do more to accelerate minority ownership in telecommunications than anything we have done up to now. All the things you have mentioned we have done and a lot more. We only have 2 percent of the Nation's radio and television stations in minority hands, and that is because they have got to have the money in order to be able to go through litigation in order to get the preferences. They have got to have the staying power. They don't have that.

MINORITY PREFERENCES

How much better it would be and what a better world it would be if we could take several hundred million dollars and put it in a revolving fund of loans that went out to people who met a "means" test. They could go out and buy stations in markets that they were interested in. I think we could do more to raise that number to, let's say, 10 percent in 3 or 4 years than we have done now fiddling around on the margins in the past 15 years.

That was one of my ideas. I still think it is a good idea. Of course, it ties into spectrum auctions here.

Senator LAUTENBERG. I don't want to deal with Senator Rudman's inquiry. He is of clear thought, and he will see that we——

Mr. FOWLER. I also wanted to put them into supporting public broadcasting. [Laughter.]

Senator RUDMAN. Do you have more sweetners for us, Mr. Chairman? [Laughter.]

Senator LAUTENBERG. How about taking care of my particular problem in the process, and then we will back off to the others? The Steel case dealt with gender, not minorities, am I correct?

Mr. FOWLER. Pardon me?

Senator LAUTENBERG. The Steel case?

Mr. FOWLER. Yes, sir.

Senator LAUTENBERG. Why do you feel that we can't proceed, then? In my view, there seems to be no question about whether or not you have the ability to make the decisions in the case of the minority.

Mr. FOWLER. Because the Steel case also discussed the very lengthy question of race-based preferences, although it didn't hold on that. Underpinning gender preferences is the same basis we use to justify race-based preferences. The two are implicated.

If you are looking at one, you are looking at the other. Constitutionally, from public policy, we felt it was imperative, as we looked at the Supreme Court case law, including the decision made in 1986 in the summer. We believe it was imperative to look at both of them at the same time, particularly since in many of these proceedings, you have both gender- and race-based preferences involved in comparing one applicant with the other.

So it seems, as a matter of fairness, imperative that we look at both of them at the same time as well as the facts; that the bases are the same for both.

Senator LAUTENBERG. I hope we can resolve the issue, because if you do not support the principle, then we cannot make sure that we have the opportunity for minorities and women to own these licenses and to present the diversity of views that I frankly think is essential if we are going to use our resources fairly.

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QUESTIONS SUBMITTED BY SENATOR LAUTENBERG

FM RADIO

Question: The New Jersey Class A Broadcasters Association, representing a majority of our state's FM broad-

casters, recently filed a proposal to allow a blanket power increase to 6 kilowatts power at 100 meters height (or 4 kilowatts at 125 meters) for all Class A broadcast stations from the present limits of 3 kilowatts at 100 meters height.

This proposal brought to light the state's past and present broadcast allocation problems and sought to address to some degree the increasing problems of New Jersey markets outgrowing the signal of the Class A FM stations designed to cover them. The problem is particularly acute in New Jersey, where most of the state receives most of its local, New Jersey-oriented FM radio service from Class A stations. The history of allocations shortchanged New Jersey.

The Commission chose to dismiss the proposal without comment. What kind of relief is the Commission prepared to offer Class A broadcasters in New Jersey? Does the Commission agree that the allocation of radio stations historically shortchanged New Jersey? What avenues are available to the New Jersey broadcasters to enable them to reach their growing audiences?

Answer: The New Jersey Class A Broadcasters Association's proposal to increase the allowable maximum Class A operating power was filed in a recently concluded proceeding in MM Docket No. 86-144, *In the Matter of FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations*. Because the Commission initiated the Docket 86-144 proceeding for the limited purpose of seeking comments on proposals to adjust and review inconsistencies in certain of its FM technical rules in light of its action in Docket 80-90, proposals such as that by New Jersey Class A Broadcasters Association for blanket increases were not contemplated and thus the Commission found the proposal to be outside the scope of the proceeding. Further, it was deemed inappropriate to decide such proposals because the Commission lacked an adequate record on which to base action. Finally, the Commission's staff also

determined that bilateral agreements with Canada and with Mexico would be required in order to implement such increases.

It is anticipated that this proposal may be refiled at some future date and will contain further engineering analyses of the effect of such upgrades will have on the coverage of other existing stations. In addition, as noted, extensive international negotiations would be necessary in order to provide Class A power increases to the Canadian and Mexican border areas.

As for the history of New Jersey allocations and future solutions, the Commission has been aware of the concern that there are insufficient local outlets for the residents of New Jersey. The Commission continues to seek to provide additional outlets for New Jersey and all other states.

MINORITY BROADCASTERS

Question: At the hearing, you stated that the court in *Steel v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985) raised questions about the basis for race-based preferences in the award of broadcasting licenses. The Circuit stated in the case: "Under our decisions, the Commission's authority to adopt minority preferences even apart from the lottery process—at least where such preferences are tied to minority participation in the management of broadcast facilities—is clear." 770 F.2d at 1196. In light of that statement, what is the basis for the FCC to expand its inquiry to include an inquiry of its authority in the area of minority preferences as opposed to gender-based preferences?

Answer: In *Steele*, a divided panel of the D.C. Circuit Court of Appeals in throwing out the Commission's women's preference policy criticized the *assumptions* underlying the FCC's minority preference policy. This was because the women's preference scheme was a direct outgrowth of the Commission's minority preference policy, whose origins can be traced back to 1972 and the *TV-9* case.

In *TV-9*, the Commission refused to award a minority preference without a demonstration that the proposed minority ownership would enhance program diversity. The D.C. Circuit reversed the Commission, and told the FCC that it should grant a preference to the minority owner based solely on the assumption that minority ownership and participation would lead to program diversity. No factual record was developed on the issue. Since then, the Commission has followed the Court's mandate in *TV-9*. Preferences are now routinely granted to minorities without requiring that a nexus to program diversity be shown. In 1978, the FCC's review Board extended the minority preference policy to females on the theory that the logic of *TV-9* applied equally to women. Thus, a nexus to program diversity again was assumed without conducting a factual inquiry. The Commission acquiesced to that extension of the female preference policy in subsequent cases. But until the *Steele* court criticized the assumptions underlying the minority and female preference policies neither the Commission nor the Board ever discussed or examined further the assumptions which the policy was based.

In summation, the basis for the Commission to expand its inquiry on gender-based preference to include an inquiry into minority-based preferences is that the assumptions and premises underlying gender-based preferences are the same assumptions and premises upon which the minority preference rests. Thus, on examination of the assumption and premises underlying gender-based preferences necessarily involves an examination of minority-based preferences.

Questions: Specifically, how does the Commission plan to examine whether a "nexus" exists between minority ownership and diversity in programming? Does the commission plan to examine the content of programming? How would such an examination differ from the kind of judgments

that the Commission believed violated the First Amendment in the Fairness Report?

Answer: In its brief submitted to the *Steele* court, the Commission concluded that racial and gender classification may not be based solely on the assumption that integrated minority/female owners will result in increased content diversity. The Commission concluded, therefore, that an inquiry should be conducted to reexamine the legal and factual predicates of our policies. To that end, the Commission issued a Notice of Inquiry reexamining the FCC's comparative licensing, distress sales, and tax certificate policies premised on racial, ethnic or gender classifications. As part of that inquiry, the Commission sought to determine whether there is a nexus between minority/female ownership and viewpoint diversity, and whether such ownership is necessary to achieve that goal. The Commission developed a series of questions designed to elicit evidence on the nexus issue.

The following list of questions from the Notice of Inquiry deal specifically with programming:

> "To what extent is the relationship between integrated minority/female ownership and increased availability of minority/female perspectives and programming empirically demonstrable? Is there, for example, a demonstrable difference in the amount or nature of minority-oriented programming broadcast by minority-owned stations and that broadcast by non-minority-owned stations under similar market conditions, such as where there is a significant minority population? How should minority or female-oriented programming be defined for purposes of this analysis? Do these definitions apply to all media?"

While the foregoing list of questions does involve an examination of programming, that inquiry is a one-time study

designed to elicit empirical evidence to determine whether there is a nexus between minority/female ownership and viewpoint diversity as required by the Constitution and to focus attention on the effectiveness of the minority/female ownership policies in achieving their intended goals. On the other hand, the Fairness Doctrine, which requires that broadcast stations (1) broadcast discussion of the most important controversial issues in the station's coverage area; and (2) provide reasonable opportunity for the presentation of contrasting views on these issues, limits the First Amendment rights of the broadcasters based upon some notion of fairness which necessarily involves the continuing government oversight and intrusion into the editorial judgment of broadcasters.

Question; If the Commission determines that the distress sale policy is unconstitutional, will it apply its decision prospectively? What will be the fate of the WHCT-TV license? Has the Commission considered the problems that would result from retroactive application?

Answer: No decision has been made to date with respect to the general question of the constitutionality of the distress sale policy since it is the subject matter of the pending *Inquiry*. In addition, no consideration has been given up to this point to applying any decision retroactively in a manner that would reopen proceedings already concluded. Generally speaking, if changes in the policy are adopted, they would be applied prospectively, subject only to applicable constitutional requirements.

As a consequence of the Court's remand of the *Shurberg* (WCHT) case, further input form the parties to the case has been sought as to what further procedural or substantive steps should be taken to resolve the proceeding. Because this is a restricted adjudicatory proceeding and because no decisions have been made as to how to respond to the Court's remand order, it would not be appropriate

to comment further at this point on the likely final disposition of the WHCT-TV license.

AM AND DAYTIME BROADCASTERS

Question: Last spring, the FCC issued a Report on the Status of the AM Broadcast Rules. One section of the report referred to the modifications of rules which authorized post-sunset operation of daytime-only stations. The report stated:

"While the new rule has brought substantial benefits to both stations and listeners, they fall short of removing the distinction between daytime-only and full-time stations. *Nor does such operation necessarily represent the furthest step the Commission could take consistent with its interference protection standards.*" [emphasis added]

The report went on to discuss the use of the same computer resources which were used in the post-sunset study to determine the power which could be used under full nighttime conditions without causing interference.

What steps has the FCC taken since the publication of this report to study and recommend power levels under full nighttime conditions? If nothing has been done why not? What future plans does the FCC have to address this issue?

Answer: On January 17, 1987, the Mass Media Bureau presented a detailed report to the Commission summarizing the comments received from the industry

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